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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, [redacted] 1921

No. [redacted]76

THE BANK OF JASPER, PETITIONER,

vs.

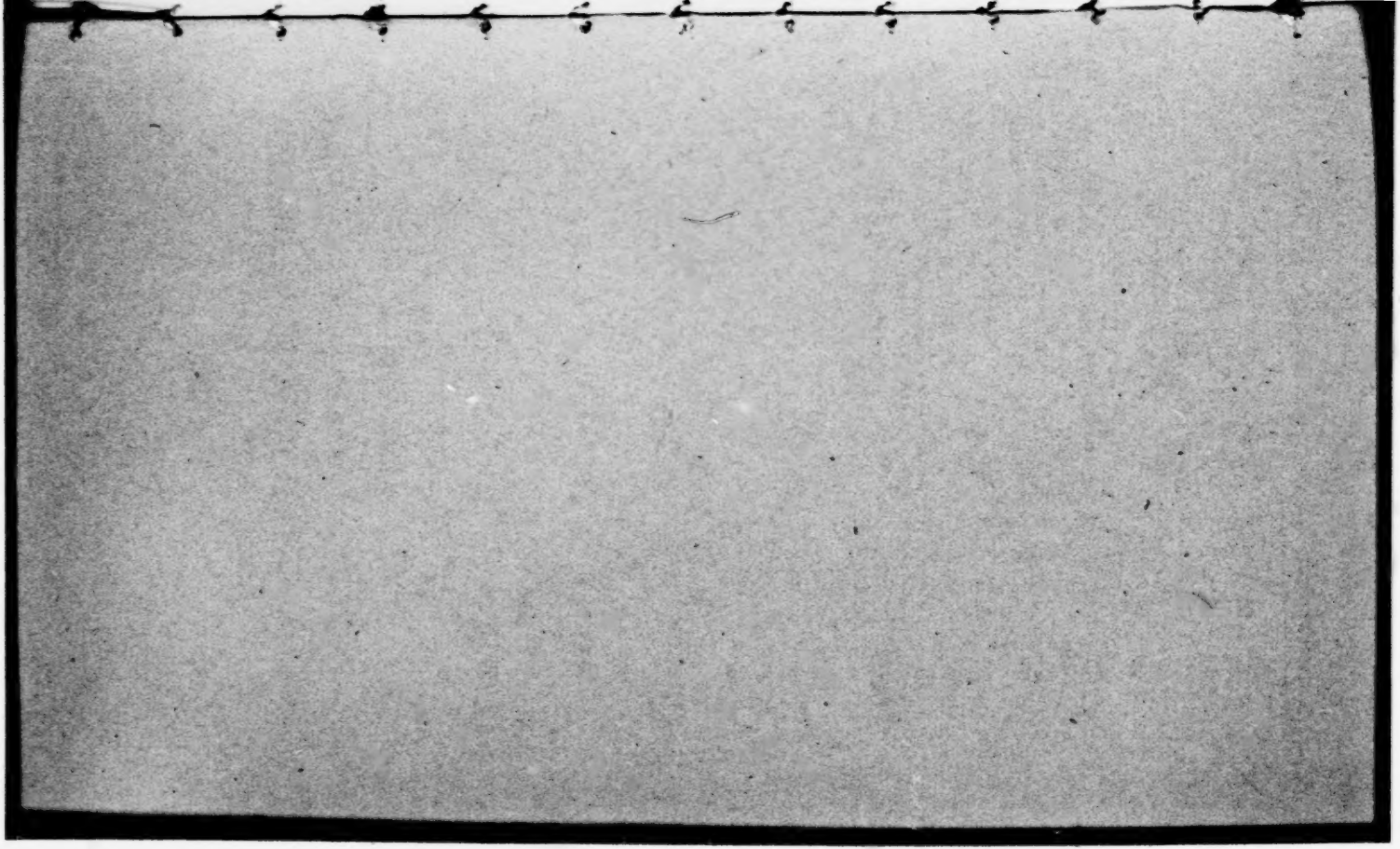
FIRST NATIONAL BANK OF ROME, GEORGIA.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

PETITION FOR CERTIORARI FILED JUNE 7, 1920.

CERTIORARI AND RETURN FILED OCTOBER 22, 1920.

(27,740)



(27,740)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1920.

No. 383.

THE BANK OF JASPER, PETITIONER,

vs.

FIRST NATIONAL BANK OF ROME, GEORGIA.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

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a UNITED STATES OF AMERICA:

United States Circuit Court of Appeals, Fifth Judicial Circuit.

Pleas and Proceedings Had and Done at a Regular Term of the United States Circuit Court of Appeals for the Fifth Circuit Begun on the Third Monday in November, A. D. 1919, at New Orleans, Louisiana, Before the Honorable Richard W. Walker, Circuit Judge, and the Honorable William I. Grubb and the Honorable George W. Jack, District Judges.

FIRST NATIONAL BANK OF ROME, GEORGIA, Plaintiff in Error,

versus

THE BANK OF JASPER, Defendant in Error.

Be it remembered, That heretofore, to wit, on the 25th day of August, A. D. 1919, a transcript of the record in the above styled cause, pursuant to a writ of error to the District Court of the United States for the Southern District of Florida, was filed in the office of the Clerk of the said United States Circuit Court of Appeals for the Fifth Circuit, which said transcript was filed and docketed in said Circuit Court of Appeals as No. 3431, as follows, to wit:

b TRANSCRIPT OF RECORD.

United States Circuit Court of Appeals, Fifth Circuit.

No. 3431.

FIRST NATIONAL BANK OF ROME, GEORGIA, Plaintiff in Error,

versus

THE BANK OF JASPER, Defendant in Error.

Error to the District Court of the United States for the Southern District of Florida.

[Original Record Filed August 25, 1919.]

U. S. Circuit Court of Appeals. Filed Nov. 15, 1919. Frank H. Mortimer, Clerk.

Deposit of that date, the same being its Certificate of Deposit No. 316, for value received, promised the American Bank and Trust Company, Trustee, of Rome, Georgia, to pay it, or its order, the sum of $441.00, on or after, to-wit, November 22nd, 1912, with interest at the rate of 4 per cent. per annum, compounded quarterly; and the said American Bank and Trust Company, Trustee, thereafterwards indorsed the said certificate of deposit and transferred the same to the First National Bank of Rome, Georgia, which said indorsement appears thereon and which is shown by the copy of the said certificate of deposit attached to and hereby made a part of this declaration, the said certificate being found in the bill of particulars attached hereto, whereby the said Bank of Jasper became liable and in consideration thereof, promised the plaintiff to pay it the contents of the said certificate of deposit, according to the tenor thereof; and the plaintiffs avers that the said 22nd day of November, 1912, has long since passed, yet, though since that time requested, said request being accompanied with a return of the said Certificate of Deposit properly indorsed, the said Bank of Jasper has never paid the said amount, or any part thereof, but refuses so to do.

And for a third count, plaintiff says that the said Bank of Jasper, on, to-wit, the 23rd day of November, 1911, at, to-wit, the city of Jasper, Florida, by its negotiable certificate of deposit of that date, the same being its certificate of deposit No. 317, for value received, promised the American Bank and Trust Company, Trustee, of Rome, Georgia, to pay it or order the sum of $1,470.00, on or after November 23rd, 1912, with interest at the rate of 4 per cent. per annum, compounded quarterly, and the said American Trust Company, Trustee, thereafterwards indorsed the said certificate of deposit and transferred the same to the First National Bank of Rome, Georgia; which said indorsement appears thereon and which is shown by the copy of the said certificate of deposit attached to and hereby made a part of this declaration, the said certificate being found in the bill of particulars attached hereto, whereby the said Bank of Jasper became liable and in consideration thereof, promised the plaintiff to pay it the contents of the said Certificate of Deposit according to the tenor thereof; and the plaintiff avers that the said 23rd day of November, 1912, has long since passed, yet, though since that time requested, said request being accompanied with a return of the said certificate of deposit properly indorsed, the said Bank of Jasper hath never paid the said amount, nor any part thereof, but refuses so to do.

And for a fourth count, plaintiff says that the said Bank of Jasper, on, to-wit, November 23rd, 1911, at, to-wit, the city of Jasper, Florida, by its negotiable certificate of deposit for that date, the same being its certificate of deposit No. 318, for value received, promised the American Bank and Trust Company, Trustee, of Rome, Georgia, to pay it or its order, the sum of $735.00, on or after, to-wit, November 23rd, 1912, with interest at the rate of 4 per cent. per annum, compounded quarterly; and the said American Bank and Trust Company, Trustee, thereafterwards indorsed the

said certificate of deposit and transferred the same to the First National Bank of Rome, Georgia, which said indorsement appears thereon, and which is shown by the copy of said certificate of deposit attached to and hereby made a part of this declaration, the said certificate being found in the bill of particulars attached hereto, and whereby the said Bank of Jasper became liable and in consideration thereof, promised the plaintiff to pay it the contents of the said certificate of deposit according — the tenor thereof; and the plaintiff avers that the said 23rd day of November, 1912, has long since passed, yet, though since that time requested, said request being accompanied with a return of the said certificate of deposit properly indorsed, the said Bank of Jasper hath never paid the said amount, nor any part thereof, but refuses so to do.

And for a fifth count, plaintiff says that the said Bank of Jasper, on, to-wit, November 25th, 1911, at to-wit, the city of Jasper, Florida, by its negotiable certificate of deposit of that date, the same being its certificate of deposit No. 319, for value received, promised the American Bank and Trust Company, Trustee, of Rome, Georgia, to pay it or its order the sum of $1,588.20, on or after November 25th, 1912, with interest at the rate of 4 per cent. per annum, compounded quarterly; and the said American Bank and Trust Company, Trustee, thereafterwards indorsed the said certificate of deposit and transferred the same to the First National Bank of Rome, Georgia, which said indorsement appears thereon, and which is shown by the copy of the said certificate of deposit attached to and hereby made a part of this declaration, the said certificate being found in the bill of particulars attached hereto, whereby the said Bank of Jasper became liable and in consideration thereof, promised the plaintiff to pay it the contents of the said certificate of deposit according to the tenor thereof; and the plaintiff avers that the said 25th day of November, 1912, has long since passed, yet, though since that time requested, said request being accompanied with a return of the said certificate of deposit properly indorsed, the said Bank of Jasper hath never paid the said amount, nor any part thereof, but refuses so to do.

And for a sixth count, plaintiff says that the defendant, on, towit, the 21st day of November, 1911, at, towit, the city of Jasper aforesaid, received the sum of $2,940.00 for the use of the plaintiff, and in consideration thereof promised to pay the plaintiff, on or after to-wit, November 21st, 1912, the said sum of money so due as aforesaid, with interest at the rate of 4 per cent. per annum, compounded quarterly; and the plaintiff avers that the said 21st day of November, 1912, has long since passed, yet, though since that time requested, the defendant has never paid the said sum, nor any part thereof, but refuses so to do.

And for a seventh count, the plaintiff says that the defendant, on, to-wit, the 22nd day of November, 1911, at, to-wit, the city of Jasper aforesaid, received the sum of $141.00 for the use of the plaintiff, and in consideration thereof, promised to pay the plaintiff on or after the 22nd day of November, 1912, the said sum of money so due as

aforesaid, with interest at the rate of 4 per cent. per annum, compounded quarterly; and the plaintiff avers that the said 22nd day of November, 1912, has long since passed yet, though since that time requested, the defendant hath never paid the said sum, nor any part thereof, but refuses so to do.

And for an eighth count, plaintiff says that the defendant, on, to-wit, the 23rd day of November, 1911, at, to-wit, the city of Jasper aforesaid, received the sum of $1,470.00 for the use of the plaintiff, and in consideration thereof, promised to pay the plaintiff on or after, to-wit, November 23rd, 1912, the said sum of money due as aforesaid, with interest at the rate of 4 per cent. per annum, compounded quarterly; and the plaintiff avers that the said 23rd day of November, 1912, has long since passed, yet, though since that time requested, the defendant has never paid the said sum, nor any part thereof, but refuses so to do.

And for a ninth count, plaintiff says that the defendant, on, to-wit, the 23rd day of November, 1911, at, to-wit, the said city of Jasper, Florida, received the sum of $735.00 for the use of the plaintiff and in consideration thereof, promised to pay the plaintiff on or after November the 23rd, 1912, the said sum of money so
8 due as aforesaid, with interest at the rate of 4 per cent. per annum, compounded quarterly; and the plaintiff avers that the said 23rd day of November, 1912, has long since passed, yet, though since that time requested, the defendant has never paid the said sum nor any part thereof, but refuses so to do.

And for a tenth count, plaintiff says that the defendant, on, to-wit, the 25th day of November, 1911, at, to-wit, the city of Jasper aforesaid, received the sum of $1,558.20 for the use of the plaintiff, and in consideration thereof promised to pay the plaintiff on or after, to-wit, November 25th, 1912, the said sum of money so due as aforesaid, with interest at the rate of 4 per cent. per annum, compounded quarterly; and the plaintiff avers that the said 25th day of November, 1912, has long since passed, yet, though since that time requested, the defendant hath never paid the said sum nor any part thereof, but refuses so to do.

Wherefore, the plaintiff brings this, its suit against the defendant and claims damages in the sum of $12,000.00.

KAY & DOGGETT,
Attorneys for Plaintiff.

9 *Bill of Particulars.*

No. 315.

Certificate of Deposit.

The Bank of Jasper. $2,940.00.
3,059.38.

Jasper, Fla., Nov. 21st, 1911.

American Bank & Trust Co., Trustee, Rome, Ga., has deposited in this Bank Twenty-nine Hundred Forty & No/100 Dollars payable

to the order of itself with interest at rate of 4% compounded quarterly on the return of this Certificate properly indorsed. Not due until November 21st, 1912.

W. S. MURROW,
Cashier.

Not subject to check.

Copy.

Certificate of Deposit.

No. 316.

The Bank of Jasper.

$441.00
458.00.

Jasper, Fla., Nov. 22, 1911.

American Bank & Trust Co., Trustee, Rome, Ga., has deposited in this Bank Four Hundred Forty-one and No/100 Dollars payable to the order of itself with interest at rate of 4% per annum compounded quarterly on the return of this Certificate properly indorsed On or after November 22nd, 1912.

W. S. MURROW,
Cashier.

Not subject to check.

Copy.

10 Certificate of Deposit.

No. 317.

The Bank of Jasper.

$1,470.00.
1,529.69.

Jasper, Fla., Nov. 23rd, 1911.

American Bank & Trust Co., Trustee, Rome, Ga., has deposited in this Bank Fourteen Hundred and Seventy and No/100 Dollars payable to the order of itself with interest at 4% per annum compounded quarterly on the return of this Certificate properly indorsed on or after November 23rd, 1912.

Not subject to check.

W. S. MURROW,
Cashier.

Copy.

Certificate of Deposit.

No. 318.

The Bank of Jasper.

$735.00.
764.84.

Jasper, Fla., Nov. 23, 1911.

American Bank & Trust Co., Trustee, Rome, Ga., has deposited in this Bank Seven Hundred Thirty-five and No/100 Dollars payable to the order of itself with interest at the rate of 4% per annum compounded quarterly on the return of the Certificate properly indorsed On or after Nov. 23rd, 1912.

W. S. MURROW,
Cashier.

Not subject to check.

Copy.

11 Certificate of Deposit.

No. 319.

The Bank of Jasper.

$1,558.20.
1,621.46.

Jasper, Fla., Nov. 25th, 1911.

American Bank & Trust Co., Trustee, of Rome, Ga., has deposited in this Bank Fifteen Hundred Fifty-eight and 20/100 Dollars payable to the order of itself with interest at the rate of 4% per annum compounded quarterly on the return of this Certificate properly indorsed, on or after Nov. 25th, 1912.

Not subject to check.

W. S. MURROW,
Cashier.

Copy.

Indorsed: Declaration. Filed March 8, 1913. E. O. Locke, Clerk.

Stipulation of Counsel.

In the District Court of the United States for the Southern District of the State of Florida.

FIRST NATIONAL BANK OF ROME, GEORGIA, Plaintiff.

v.

THE BANK OF JASPER, FLORIDA, Defendant.

It is hereby stipulated and agreed between counsel representing the plaintiff and counsel representing the defendant in the above entitled

cause that the time for further pleading by the defendant may be and the same is hereby extended until the Rule Day in August, 1914, and an order may be entered accordingly.

Agreed to this 20 day of July, 1914.

KAY & DOGGETT,
Attorneys for Plaintiff.
CARTER McCOLLUM,
Attorneys for Defendant.

12 Upon consideration of the foregoing stipulation it is ordered that the time for further pleading by the defendant in the above entitled cause be and the same is hereby extended until the Rule Day in August, 1914.

Done and ordered this 20th day of July, 1914.

R. M. CALL,
Judge.

Filed Jul. 20, 1914.
E. D. DODGE,
Clerk.

Additional Pleas of Defendant.

In the District Court of the United States for the Southern District of the State of Florida.

FIRST NATIONAL BANK OF ROME, GEORGIA, Plaintiff,

v.

THE BANK OF JASPER, FLORIDA, Defendant.

Comes now the defendant by its undersigned attorneys and for an additional plea to the First Count of plaintiff's declaration says:

That the said plaintiff ought not to have and maintain its action in this behalf because prior to the commencement of this suit and on, to-wit, the 3rd day of January, 1913, one C. L. Adams instituted his suit on the Chancery side of the Circuit Court of Hamilton County, Florida, against this Defendant and the said plaintiff herein and against the Rome Insurance Company and American Bank & Trust Company and this defendant avers that said Circuit Court of Hamilton County, Florida, was and is a Court of general jurisdiction; that in and by said suit so instituted as aforesaid, it was claimed and alleged by the said complainant therein, among other things, that the certificate of deposit, in said count sued upon, was issued by this defendant to cover and include the proceeds of a certain note
13 executed by the said complainant, C. L. Adams, and that said note was made payable to the order of the said complainant, and was procured by the false and fraudulent representations of the said Rome Insurance Company, and its Trustee, the said American Bank & Trust Company; that the proceeds of said note so procured as aforesaid were deposited with this defendant in its banking house

in Jasper, Hamilton County, Florida, and the certificate of deposit in said count sued upon, represents and covers the proceeds of said note so procured as aforesaid, and that such deposit has at all times since the date of the said certificate of deposit been and remained in the said banking house of this defendant at Jasper aforesaid, and in and by the said suit the said complainant, C. L. Adams, claimed and alleged that the said deposit was created by the fraud and deceit of said Rome Insurance Company and its Trustee, the said American Bank & Trust Company, and that said certificate of deposit, in this count sued upon, was likewise procured by the fraud of the said Rome Insurance Company and its Trustee, the said American Bank & Trust Company, and the said complainant in the said Chancery suit sought to have the said fund, the proceeds of said certificate of deposit, in the defendant's banking house at Jasper aforesaid, impressed with a trust in favor of said complainant and therein and thereby prayed, among other things, that the said certificate of deposit be decreed null and of no effect and that the said funds be decreed to belong to the said complainant in said Chancery suit; that thereafter, to-wit, on the 14th day of July, 1914, and since the filing of the last pleadings herein, the Judge of the said Circuit Court of Hamilton County, Florida, duly rendered a final decree in said Chancery suit and therein and thereby adjudged and decreed among other things, the proceeds of said complainant's note, to-wit, the sum of Two Thousand, Nine Hundred and Forty Dollars, covered by and included in the said certificate of deposit, in this count sued upon, and held
14 by the plaintiff herein, to be impressed with a trust in favor of the complainant and were adjudged to belong to him, and the plaintiff herein was decreed to have no right, title, interest, claim or demand of, in and to the said proceeds or any part thereof, and this defendant was therein and thereby required and directed to pay the said proceeds over to the said complainant in said Chancery suit, and was enjoined from paying the said proceeds to the plaintiff herein or to anyone for it; and in and by said final decree the certificate of deposit, in this count sued upon, dated the 21st day of November, 1911, in so far as it covered and included the proceeds derived from said note executed by the complainant in said Chancery suit, was decreed to be void and of no effect; that said final decree was duly and regularly entered and recorded in Circuit Court Minute Docket No. H, page 277, of the Public Records of Hamilton County, Florida, on the 14th day of July, 1914; all of which will more fully appear reference being had to a certified copy of said final decree attached to and made a part of this plea as fully as if set out in hec verba, and marked exhibit "A."

And the defendant for an additional plea to the second count of plaintiff's declaration, says:

That the said plaintiff ought not to have and maintain its action in this behalf because prior to the commencement of this suit and on, to-wit, the 3rd day of January, 1913, one A. L. Wise instituted his suit on the Chancery side of the Circuit Court of Hamilton County, Florida, against this defendant and the said plaintiff herein, and against the Rome Insurance Company and American Bank & Trust

Company, and this defendant avers that said Circuit Court of Hamilton County, Florida, was and is a Court of general jurisdiction; that in and by said suit so instituted as aforesaid, it was claimed and alleged by the said complainant therein, among other things, that the certificate of deposit, in said count, sued upon, was issued
15 by this defendant to cover and include the proceeds of a certain note executed by the said complainant A. L. Wise, and that said note was made payable to the order of the said complainant, and was procured by the false and fraudulent representations of the said Rome Insurance Company, and its Trustee, the said American Bank & Trust Company; that the proceeds of said note so procured as aforesaid, were deposited with this defendant in its banking house in Jasper, Hamilton County, Florida, and the certificate of deposit, in said count sued upon, represents and covers the proceeds of said note so procured as aforesaid, and that such deposit has at all times since the date of the said certificate of deposit been and remained in the said banking house of this defendant at Jasper, aforesaid, and in and by the said suit the said complainant A. L. Wise claimed and alleged that the said deposit was created by the fraud and deceit of the said Rome Insurance Company and its Trustee, the said American Bank & Trust Company, and that said certificate of deposit, in this count sued upon, was likewise procured by the fraud of the said Rome Insurance Company and its Trustee, the said American Bank & Trust Company, and the said complainant in the said Chancery suit sought to have the said fund, the proceeds of said certificate of deposit, in the defendant's banking house at Jasper aforesaid, impressed with a trust in favor of said complainant and therein and thereby prayed, among other things, that the said certificate of deposit be decreed null and of no effect and that the said funds be decreed to belong to the said complainant in said Chancery suit; that thereafter, to-wit, on the 14th day of July, 1914, and since the filing of the last pleadings herein, the Judge of the said Circuit Court of Hamilton County, Florida, duly rendered a final decree in said Chancery suit and therein and thereby adjudged and decreed, among other things the proceeds of said complainant's note, to-wit, the sum of Four Hundred and Forty-one Dollars, covered by and included in the said certificate of deposit, in this count sued upon, and
16 held by the plaintiff herein, to be impressed with a trust in favor of the said complainant and were adjudged to belong to him, and the plaintiff herein was decreed to have no right, title, interest, claim or demand of, in and to the said proceeds or any part thereof, and this defendant was therein and thereby required and directed to pay the said proceeds over to the said complainant in said Chancery suit, and was enjoined from paying the said proceeds to the plaintiff or to anyone for it; and in and by said final decree the certificate of deposit, in this count sued upon, dated the 22nd day of November, 1911, in so far as it covered and included the proceeds derived from said note executed by the complainant in said Chancery suit, was decreed to be void and of no effect; that the said final decree was duly and regularly entered and recorded in Circuit Court Minute Docket No. 11, page 271 of the Public Records of Hamilton County,

Florida, on the 14th day of July, 1914; all of which will more fully appear reference being had to a certified copy of said final decree attached to and made a part of this plea as if set out in hec verba and marked exhibit "B."

And the defendant for an additional plea to the third count of plaintiff's declaration, says:

That the said plaintiff ought not to have and maintain its action in this behalf because prior to the commencement of this suit and on, to-wit, the 3rd day of January, 1913, one J. B. Wetherington instituted his suit on the Chancery side of the Circuit Court of Hamilton County, Florida, against this Defendant and the said plaintiff herein and against the Rome Insurance Company and American Bank & Trust Company and this defendant avers that said Circuit Court of Hamilton County, Florida, was and is a Court of general jurisdiction; that in and by said suit so instituted as aforesaid, it was claimed and alleged by the said complainant therein, among other
17 things, that the certificate of deposit, in said count sued upon, was issued by this defendant to cover and include the proceeds of a certain note executed by the said complainant, J. B. Wetherington, and that said note was made payable to the order of the said complainant, and was procured by the false and fraudulent representations of the said Rome Insurance Company, and its Trustee, the said American Bank & Trust Company; that the proceeds of said note so procured as aforesaid were deposited with this defendant in its banking house in Jasper, Hamilton County, Florida, and the certificate of deposit in said count sued upon, represents and covers the proceeds of said note so procured as aforesaid, and that such deposit has at all times since the date of the said certificate of deposit been and remained in the said banking house of this defendant at Jasper aforesaid, and in and by the said suit the said complainant, J. B. Wetherington claimed and alleged that the said deposit was created by the fraud and deceit of said Rome Insurance Company and its Trustee, the said American Bank & Trust Company, and that said certificate of deposit, in this count sued upon, was likewise procured by the fraud of the said Rome Insurance Company and its Trustee, the said American Bank & Trust Company, and the said complainant in the said Chancery suit sought to have the said fund, the proceeds of said certificate of deposit, in the defendant's banking house at Jasper aforesaid, impressed with a trust in favor of said complainant and therein and thereby prayed, among other things, that the said certificate of deposit be decreed null and of no effect and that the said funds be decreed to belong to the said complainant in said Chancery suit; that thereafter, to-wit, on the 14th day of July, 1914, and since the filing of the last pleadings herein, the Judge of the said Circuit Court of Hamilton County, Florida, duly rendered a final decree in said Chancery suit and therein and thereby adjudged and decreed, among other things, the proceeds of said complainant's note,
18 to-wit, the sum of One Thousand Four Hundred and Seventy Dollars, covered by and included in the said certificate of deposit, in this count sued upon, and held by the plaintiff herein, to be impressed with a trust in favor of the complainant and were adjudged

to belong to him, and the plaintiff herein was decreed to have no right, title, interest, claim or demand of, in and to the said proceeds or any part thereof, and this defendant was therein and thereby required and directed to pay the said proceeds over to the said complainant in said Chancery suit, and was enjoined from paying the said proceeds to the plaintiff herein or to anyone for it; and in and by said final decree the certificate of deposit in this count sued upon, dated the 23rd day of November, 1911, in so far as it covered and included the proceeds derived from said note executed by the complainant in said Chancery suit, was decreed to be void and of no effect; that said final decree was duly and regularly entered and recorded in Circuit Court Minute Docket No. 11, page 283 of the Public Records of Hamilton County, Florida, on the 14th day of July, 1914; all of which will more fully appear reference being had to a certified copy of said final decree attached to and made a part of this plea as if set out in hec verba, and marked exhibit "C."

And the defendant for an additional plea to the fourth count of plaintiff's declaration, says:

That the said plaintiff ought not to have and maintain its action in this behalf because prior to the commencement of this suit and on, to-wit, the 3rd day of January, 1913, one W. M. O'Cain instituted his suit on the Chancery side of the Circuit Court of Hamilton County, Florida, against this defendant and the said plaintiff herein, and against the Rome Insurance Company and American Bank & Trust Company, and this defendant avers that said Circuit Court of Hamilton County, Florida, was and is a Court of general jurisdiction; that in and by said suit so instituted as aforesaid, it was
19 claimed and alleged by the said complainant therein, among other things, that the certificate of deposit, in said count, sued upon, was issued by this defendant to cover and include the proceeds of a certain note executed by the said complainant W. M. O'Cain, and that said note was made payable to the order of the said complainant, and was procured by the false and fraudulent representations of the said Rome Insurance Company, and its Trustee, the said American Bank & Trust Company; that the proceeds of said note so procured as aforesaid, were deposited with this defendant in its banking house in Jasper, Hamilton County, Florida, and the certificate of deposit, in said count sued upon, represents and covers the proceeds of said note so procured as aforesaid, and that such deposit has at all times since the date of the said certificate of deposit been and remained in the said banking house of this defendant at Jasper, aforesaid, and in and by the said suit the said complainant W. M. O'Cain claimed and alleged that the said deposit was created by the fraud and deceit of the said Rome Insurance Company and its Trustee, the said American Bank & Trust Company, and that said certificate of deposit, in this count sued upon, was likewise procured by the fraud of the said Rome Insurance Company and its Trustee, the said American Bank & Trust Company, and the said complainant in the said Chancery suit sought to have the said fund, the proceeds of said certificate of deposit, in the defendant's banking house at Jasper aforesaid, impressed with a trust in favor of said complainant

and therein and thereby prayed, among other things, that the said certificate of deposit be decreed null and of no effect and that the said funds be decreed to belong to the said complainant in said Chancery suit; that thereafter, to-wit, on the 14th day of July, 1914, and since the filing of the last pleadings herein, the Judge of the said Circuit Court of Hamilton County, Florida, duly rendered a final decree in said Chancery suit and therein and thereby adjudged and decreed, among other things the proceeds of said complain-
20 ant's note, to-wit, the sum of Seven Hundred and Thirty-five Dollars, covered by and included in the said certificate of deposit, in this count sued upon, and held by the plaintiff herein, to be impressed with a trust in favor of the said complainant and were adjudged to belong to him, and the plaintiff herein was decreed to have no right, title, interest, claim or demand of, in and to the said proceeds or any part thereof, and this defendant was therein and thereby required and directed to pay the said proceeds over to the said complainant in said Chancery suit, and was enjoined from paying the said proceeds to the plintiff or to anyone for it; and in and by said final decree the certificate of deposit, in this count sued upon, dated the 23rd day of November, 1911, in so far as it covered and included the proceeds derived from said note executed by the complainant in said Chancery suit, was decreed to be void and of no effect; that the said final decree was duly and regularly entered and recorded in Circuit Court Minute Docket No. 11, on page 276 of the Public Records of Hamilton County, Florida, on the 14th day of July, 1914; all of which will more fully appear reference being had to a certified copy of said final decree attached to and made a part of this plea as fully as if set out in hec verba and marked exhibit "D."

And the defendant for a first additional plea to the fifth count of plaintiff declaration, says:

That the said plaintiff ought not to have and maintain its action in this behalf because prior to the commencement of this suit and on, to-wit, the 3rd day of January, 1913, one J. F. Thaggard instituted his suit on the Chancery side of the Circuit Court of Hamilton County, Florida, against this Defendant and the said plaintiff herein and against the Rome Insurance Company and American Bank & Trust Company and this defendant avers that said Circuit Court of Hamilton County, Florida, was and is a Court of general jurisdiction; that in and by said suit so instituted as aforesaid,
21 it was claimed and alleged by the said complainant therein, among other things, that the certificate of deposit, in said count sued upon, was issued by this defendant to cover and include the proceeds of a certain note executed by the said complainant, J. F. Thaggard, and that said note was made payable to the order of the said complainant, and was procured by the false and fraudulent representations of the said Rome Insurance Company, and its Trustee, the said American Bank & Trust Company; that the proceeds of said note so procured as aforesaid were deposited with this defendant in its banking house in Jasper, Hamilton County, Florida, and the certificate of deposit in said count sued upon, represents and covers

the proceeds of said note so procured as aforesaid, and that such deposit has at all times since the date of the said certificate of deposit been and remained in the said banking house of this defendant at Jasper aforesaid, and in and by the said suit the said complainant J. F. Thaggard claimed and alleged that the said deposit was created by the fraud and deceit of said Rome Insurance Company and its Trustee, the said American Bank & Trust Company, and that said certificate of deposit, in this count sued upon, was likewise procured by the fraud of the said Rome Insurance Company and its Trustee, the said American Bank & Trust Company, and the said complainant in the said Chancery suit sought to have the said fund, the proceeds of said certificate of deposit, in the defendant's banking house at Jasper aforesaid, impressed with a trust in favor of said complainant and therein and thereby prayed, among other things, that the said certificate of deposit be decreed null and of no effect and that the said funds be decreed to belong to the said complainant in said Chancery suit; that thereafter, to-wit, on the 14th day of July, 1914, and since the filing of the last pleadings herein, the Judge of the said Circuit Court of Hamilton County, Florida, duly rendered a final decree in said Chancery suit and therein and
22 thereby adjudged and decreed among other things, the proceeds of said complainant's note, to-wit, the sum of Two Hundred and Ninety-four Dollars, covered by and included in the said certificate of deposit, in this count sued upon, and held by the plaintiff herein, to be impressed with a trust in favor of the complainant and were adjudged to belong to him, and the plaintiff herein was decreed to have no right, title, interest, claim or demand of, in and to the said proceeds or any part thereof, and this defendant was therein and thereby required and directed to pay the said proceeds over to the said complainant in said Chancery suit, and was enjoined from paying the said proceeds to the plaintiff herein or to anyone for it; and in and by said final decree the certificate of deposit, in this count sued upon, dated the 25th day of November, 1911, in so far as it covered and included the proceeds derived from said note executed by the complainant in said Chancery suit, was decreed to be void and of no effect; that said final decree was duly and regularly entered and recorded in Circuit Court Minute Docket No. 11, page 279, of the Public Records of Hamilton County, Florida, on the 14th day of July 1914; all of which will more fully appear reference being had to a certified copy of said final decree attached to and made a part of this plea as if set out in hec verba, and marked exhibit "E."

And the defendant for additional second plea to the fourth count of plaintiff's declaration, says:

That the said plaintiff ought not to have and maintain its action in this behalf because prior to the commencement of this suit and on, to-wit, the 3rd day of January, 1913, one B. F. Carter instituted his suit on the Chancery side of the Circuit Court of Hamilton County, Florida, against this defendant and the said plaintiff herein, and against the Rome Insurance Company and American Bank &

Trust Company, and this defendant avers that said Circuit
23 Court of Hamilton County, Florida, was and is a Court of general jurisdiction; that in and by said suit so instituted as aforesaid, it was claimed and alleged by the said complainant therein, among other things, that the certificate of deposit, in said count, sued upon, was issued by this defendant to cover and include the proceeds of a certain note executed by the said complainant B. F. Carter, and that said note was made payable to the order of the said complainant, and was procured by the false and fraudulent representations of the said Rome Insurance Company, and its Trustee, the said American Bank & Trust Company; that the proceeds of said note so procured as aforesaid, were deposited with this defendant in its banking house in Jasper, Hamilton County, Florida, and the certificate of deposit, in said count represents and covers the proceeds of said note so procured as aforesaid, and that such deposit has at all times since the date of the said certificate of deposit been and remained in the said banking house of this defendant at Jasper, aforesaid, and in and by the said suit the said complainant B. F. Carter claimed and alleged that the said deposit was created by the fraud and deceit of the said Rome Insurance Company and its Trustee, the said American Bank & Trust Company, and that said certificate of deposit, in this count sued upon, was likewise procured by the fraud of the said Rome Insurance Company and its Trustee, the said American Bank & Trust Company, and the said complainant in the said Chancery suit sought to have the said fund, the proceeds of said certificate of deposit, in the defendant's banking house at Jasper aforesaid, impressed with a trust in favor of said complainant and therein and thereby prayed, among other things, that the said certificate of deposit be decreed null and of no effect and that the said funds be decreed to belong to the said complainant in said Chancery suit; that thereafter, to-wit, on the 14th day of July, 1914, and since the filing of the last pleadings herein, the Judge of the said Circuit Court of Hamilton County, Florida, duly rendered
24 a final decree in said Chancery suit and therein and thereby adjudged and decreed, among other things the proceeds of said complainant's note, to-wit, the sum of Two Hundred and Ninety-four Dollars, covered by and included in the said certificate of deposit, in this count sued upon, and held by the plaintiff herein, to be impressed with a trust in favor of the said complainant and were adjudged to belong to him, and the plaintiff herein was decreed to have no right, title, interest, claim or demand of, in and to the said proceeds or any part thereof, and this defendant was therein and thereby required and directed to pay the said proceeds over to the said complainant in said Chancery suit, and was enjoined from paying the said proceeds to the plaintiff or to anyone for it; and in and by said final decree the certificate of deposit, count sued upon, dated the 25th day of November, 1911, in so far as it covered and included the proceeds derived from said note executed by the complainant in said Chancery suit, was decreed to be void and of no effect; that the said final decree was duly and regularly entered and recorded in Circuit Court Minute Docket No. 11, page 291 of

the Public Records of Hamilton County, Florida, on the 14th day of July, 1914; all of which will more fully appear reference being had to a certified copy of said final decree attached to and made a part of this plea as if set out in hec verba and marked exhibit "F."

And the defendant for a third additional plea to the fifth count of plaintiff's declaration, says:

That the said plaintiff ought not to have and maintain its action in this behalf because prior to the commencement of this suit and on, to-wit, the 3rd day of January, 1913, one C. W. Smith instituted his suit on the Chancery side of the Circuit Court of Hamilton County, Florida, against this defendant and the said plaintiff herein, and against the Rome Insurance Company and American Bank & Trust Company, and this defendant avers that said Circuit Court of
25 Hamilton County, Florida, was and is a Court of general jurisdiction; that in and by said suit so instituted as aforesaid, it was claimed and alleged by the said complainant therein, among other things, that the certificate of deposit, in said count, sued upon, was issued by this defendant to cover and include the proceeds of a certain note executed by the said complainant C. W. Smith, and that said note was made payable to the order of the said complainant, and was procured by the false and fraudulent represenations of the said Rome Insurance Company, and its Trustee, the said American Bank & Trust Company; that the proceeds of said note so procured as aforesaid, were deposited with this defendant in its banking house in Jasper, Hamilton County, Florida, and the certificate of deposit, in said count sued upon, represents and covers the proceeds of said note so procured as aforesaid, and that such deposit has at all times since the date of the said certificate of deposit been and remained in the said banking house of this defendant at Jasper, aforesaid, and in and by the said suit the said complainant C. W. Smith claimed and alleged that the said deposit was created by the fraud and deceit of the said Rome Insurance Company and its Trustee, the said American Bank & Trust Company, and that said certificate of deposit, in this count sued upon, was likewise procured by the fraud of the said Rome Insurance Company and its Trustee, the said American Bank & Trust Company, and the said complainant in the said Chancery suit sought to have the said fund, the proceeds of said certificate of deposit, in the defendant's banking house at Jasper aforesaid, impressed with a trust in favor of said complainant and therein and thereby prayed, among other things, that the said certificate of deposit be decreed null and of no effect and that the said funds be decreed to belong to the said complainant in said Chancery suit; that thereafter, to-wit, on the 14th day of July, 1914, and since the filing of the last pleadings herein, the Judge of the said Circuit Court of
26 Hamilton County, Florida, duly rendered a final decree in said Chancery suit and therein and thereby adjudged and decreed, among other things the proceeds of said complainant's note, to-wit, the sum of Nine Hundred Seventy and 20/100 Dollars, covered by and included in the said certificate of deposit, in this count sued upon, and held by the plaintiff herein, to be impressed with a trust in favor of the said complainant and were adjudged to belong

to him, and the plaintiff herein was decreed to have no right, title, interest, claim or demand of, in and to the said proceeds or any part thereof, and this defendant was therein and thereby required and directed to pay the said proceeds over to the said complainant in said Chancery suit, and was enjoined from paying the said proceeds to the plaintiff or to anyone for it; and in and by said final decree the certificate of deposit, count sued upon, dated the 25th day of November, 1911, in so far as it covered and included the proceeds derived from said note executed by the complainant in said Chancery suit, was decreed to be void and of no effect; that the said final decree was duly and regularly entered and recorded in Circuit Court Minute Docket No. 11, page 273 of the Public Records of Hamilton County, Florida, on the 14th day of July, 1914; all of which will more fully appear reference being had to a certified copy of said final decree attached to and made a part of this plea as if set out in hec verba and marked exhibit "G."

CARTER & McCOLLUM,
S. S. SANFORD,
Attorneys for Defendant.

STATE OF FLORIDA,
County of Duval:

Before me personally came Ira J. Carter, who being duly sworn deposes and says; that he is one of the attorneys of record for the defendant in the above entitled cause; that he has read the above and foregoing pleas and that they are true.

IRA J. CARTER.

27 Sworn and subscribed to before me this 3rd day of August, 1914.

[SEAL.] J. T. CRAWLEY,
Notary Public.

Final Decree.

In Circuit Court, Third Judicial Circuit of Florida, in and for Hamilton County.

In Chancery.

C. L. ADAMS, Complainant,

v.

ROME INSURANCE COMPANY, a Corporation of Rome, Georgia; American Bank & Trust Company, a Corporation of Rome, Georgia; First National Bank of Rome, Georgia, a Corporation, and The Bank of Jasper, of Jasper, Florida, a Corporation, Defendants.

Bill for Relief.

This cause coming on this day for final hearing upon the motion of counsel for complainant for the entry of final decree upon the

amended bill of complaint taken as and for confessed by the said defendants and each of them, on to-wit, the 2nd day of March, A. D. 1914, and the Court being advised in the premises, doth find as follows:

1. That service in the above entitled cause was had on the defendants, Rome Insurance Company, American Bank & Trust Company, and First National Bank of Rome, by publication returnable to February 21st, A. D. 1913.

2. That said non-resident defendants made two motions to quash service on them and this Court made two orders dated respectively the 14th day of March, and the 3rd day of April, A. D. 1913, denying said defendants' motions to quash service.

28 3. That it has been made to appear to me by certified copies of the defendants' said motions to quash service, the orders of this Court denying the same, the appeal entered therefrom to the Supreme Court of Florida, the assignment of errors, and the mandate of said Supreme Court showing the affirmance of the orders made by this Court denying said motions to quash service in the case of B. F. Carter vs. Rome Insurance Company, exhibit "A," et al., that in the appeal in the last named case the said orders of this Court were affirmed by the said Supreme Court.

4. That on the 10th day of April, A. D. 1913, Solicitors for Complainant and Solicitors for Defendants, Rome Insurance Company, American Bank & Trust Company, and First National Bank of Rome, the said defendants' name appearing only specially, entered into a stipulation and filed the same in this Court wherein it was stipulated that the proceedings in this cause should be stayed pending the prosecution of an appeal from the orders of the Court overruling the motions of said defendants to quash service in the case of B. F. Carter v. Rome Insurance Company, et al., which said cause was then on file and being prosecuted in this Court, and wherein it was further stipulated that the ultimate decision of the said appeal in the said case of B. F. Carter v. Rome Insurance Company, et al., should be decisive of the validity of the service by publication on the said defendants in this case.

5. That the said defendants and each of them failed to demur, plead to or answer the said amended bill of complaint on or before the Rule day in March, A. D. 1914, and each of the said defendants made default therein.

6. That the clerk of this Court entered a decree pro confesso against each and every of said defendants on the Rule Day in March, A. D. 1914, for failure of said defendants to file any demurrer, plea
29 or answer to said amended bill of complaint and that the entry of said decree pro confesso by the said clerk was regular and proper under the rules and practice of this Court, and that the matters of the bill are proper to be decreed consequent upon such decree pro confesso.

7. That on, to-wit, the 21st day of November, A. D. 1911, the said complainant executed his note, as alleged in said amended bill, payable to his order, for the sum of Three Thousand and no/100 Dollars, and the defendant, American Bank & Trust Company, as trustee for the defendant, Rome Insurance Company, and the complainant by agreement with the defendant, The Bank of Jasper, deposited the said note of the complainant with the said defendant The Bank of Jasper in its banking house in Hamilton County, Florida, and procured from the said defendant The Bank of Jasper a certificate of deposit No. 315 dated the 21 day of November, A. D. 1911, and in which said certificate was included the proceeds of the said note of the complainant; that the proceeds of the said note has at all times since the deposit thereof remained and does still remain in the hands and custody of the said defendant, The Bank of Jasper, in its banking house in Hamilton County, Florida; that said note was executed by the complainant in payment of shares of the capital stock of the defendant, Rome Insurance Company, which said shares were wholly worthless and without value, and was procured by the defendants, Rome Insurance Company, and the American Bank & Trust Company, as its Trustee, by the false and fraudulent representations as set forth in the bill of complaint and the proceeds of complainant's said note was procured to be deposited, and the said certificate of deposit issued as including such proceeds as the result of such false and fraudulent representations so made as alleged in the bill by the representative of the said American Bank & Trust Company, as trustee for the defendant Rome Insurance Company.

30 8. That the equities in this cause are with the complainant and he is entitled to the relief prayed and hereinafter decreed.

Therefore, upon consideration thereof, it is ordered, adjudged and decreed as follows:

(*a*) The said decree pro confesso entered against the said defendants and each of them on, to wit, the Rule Day in March, A. D. 1914, by the Clerk of this Court for want of demurrer, plea or answer, be and the same is hereby in all respects approved, ratified and confirmed.

(*b*) That the pretended contract of agreement made by the complainant with the said Rome Insurance Company and the American Bank & Trust Company, its trustee, providing for the sale and purchase of 100 shares of the capital stock of the said Rome Insurance Company, be and the same is hereby decreed to be wholly void, and of no effect as having been procured by the fraud, deceit, covin and guile of the said Rome Insurance Company, and its trustee, the said American Bank & Trust Company.

(*c*) That the proceeds of complainant's said note, to wit, twenty-nine hundred and forty dollars, covered by and included in said certificate of deposit No. 315 now held by the defendant First

National Bank of Rome are hereby decreed to be impressed with a trust in favor of the complainant and the same are adjudged to belong to him; that the said First National Bank of Rome is hereby declared and decreed to have no right, title, interest, claim or demand of, in and to the said proceeds of the complainant's said note, or any part thereof, and the said defendant The Bank of Jasper be and it is hereby required and directed to pay the said proceeds over to the complainant.

(*d*) That the defendant, The Bank of Jasper, be and it is hereby perpetually enjoined from paying out the proceeds of the
31 said note executed by the complainant and dated as aforesaid, to the said First National Bank of Rome or to any one for it.

(*e*) That the certificate of deposit No. 315 in so far as it covers and includes the proceeds derived from the said note executed by the said complainant, and which certificate was issued by the said defendant, The Bank of Jasper, to the American Bank & Trust Company of Rome, Georgia, as trustee, dated the 21st day of November, A. D. 1911, and for the sum of twenty-nine hundred and forty dollars, be and the same is hereby decreed void and of no effect.

(*f*) That the defendant, The Bank of Jasper, do pay the costs in this case to be taxed by the Clerk of this Court.

Done, ordered, adjudged, and decreed at Chamber, at Jasper, Florida, this 14th day of July, A. D. 1914.

M. F. HORNE,
Judge.

Duly recorded in Circuit Court Minute Docket No. 11, page 277, this July 14th, 1914, public records of Hamilton County, Fla.

[SEAL.] M. P. HUNTER,
Clerk.
By C. S. FRINK,
D. C.

STATE OF FLORIDA,
Hamilton County:

I, M. P. Hunter, Clerk of the Circuit Court in and for said County, do hereby certify that the foregoing instrument is a true and correct copy of the Final Decree in the case of C. L. Adams, vs. Rome Insurance Company, et al., as the same appears in Circuit Court Minute Docket No. 11, on page 277.

Witness my hand and official seal, this 21st day of July, 1914.

M. P. HUNTER,
Clerk.
By G. D. FRINK,
D. C.

32 *Final Decree.*

In Circuit Court, Third Judicial Circuit of Florida, in and for Hamilton County.

In Chancery.

A. L. WISE, Complainant,

v.

ROME INSURANCE COMPANY, a Corporation of Rome, Georgia; American Bank & Trust Company, a Corporation of Rome, Georgia; First National Bank of Rome, Georgia, a Corporation, and The Bank of Jasper, Florida, a Corporation, Defendants.

Bill for Relief.

This cause coming on this day for final hearing upon the motion of counsel for complainant for the entry of final decree upon the amended bill of complaint taken as and for confessed by the said defendants and each of them, on, to wit, the 2nd day of March, A. D. 1914, and the Court being advised in the premises, doth find as follows:

1. That service in the above entitled cause was had on the defendants, Rome Insurance Company, American Bank & Trust Company, and First National Bank of Rome, by publication returnable to February 21st, A. D. 1913.

2. That said non-resident defendants made two motions to quash service on them and this Court made two orders dated respectively the 14th day of March, and the 3rd day of April, A. D. 1913, denying said defendants' motions to quash service.

3. That it has been made to appear to me by certified copies of defendants' said motions to quash service, the orders of this Court denying the same, the appeal entered therefrom to the Supreme Court of Florida, the assignment of errors, and the mandate
33 of said Supreme Court showing the affirmance of the orders made by this Court denying said motions to quash service in the case of B. F. Carter v. Rome Insurance Company, Exhibit "B." et al, that in the appeal in the last named case the said orders of this Court were affirmed by the said Supreme Court.

4. That on the 10th day of April, A. D. 1913, Solicitors for Complainant and Solicitors for Defendants, Rome Insurance Company, American Bank & Trust Company, and First National Bank of Rome, the said defendants' name- appearing only specially, entered into a stipulation and filed the same in this Court wherein it was stipulated that the proceedings in this cause should be stayed pending the prosecution of an appeal from the orders of the Court over-

ruling the motions of said defendants to quash service in the case of B. F. Carter v. Rome Insurance Company, et al., which said cause was then on file and being prosecuted in this Court, and wherein it was further stipulated that the ultimate decision of the said appeal in the said case of B. F. Carter v. Rome Insurance Company, et al., should be decisive of the validity of the service by publication on the said defendants in this case.

5. That the said defendants and each of them failed to demur, plead to or answer the said amended bill of complaint on or before the Rule day in March, A. D. 1914, and each of the said defendants made default therein.

6. That the clerk of this Court entered a decree pro confesso against each and every of said defendants on the Rule Day in March, A. D. 1914, for failure of said defendants to file any demurrer, plea or answer to said amended bill of complaint and that the entry of said decree pro confesso by the said clerk was regular and proper under the rules and practice of this Court, and that the matters of the bill are proper to be decreed consequent upon such decree pro confesso.

34 7. That on, to wit, the 22nd day of November, A. D. 1911, the said complainant executed his note, as alleged in said amended bill, payable to his order, for the sum of Four Hundred Fifty Dollars, and the defendant, American Bank & Trust Company, as trustee for the defendant, Rome Insurance Company, and the complainant by agreement with the defendant, The Bank of Jasper, deposited the said note of the complainant with the said defendant The Bank of Jasper in its banking house in Hamilton County, Florida, and procured from the said defendant The Bank of Jasper a certificate of deposit No. 316, dated the 22nd day of November, A. D. 1911, and in which said certificate was included the proceeds of the said note of the complainant; that the proceeds of the said note has at all times since the deposit thereof remained and does still remain in the hands and custody of the said defendant, The Bank of Jasper, in its banking house in Hamilton County, Florida; that said note was executed by the complainant in payment of shares of the capital stock of the defendant, Rome Insurance Company, which said shares were wholly worthless and without value, and was procured by the defendants, Rome Insurance Company, and the American Bank & Trust Company, as its Trustee, by the false and fraudulent representations as set forth in the bill of complaint and the proceeds of complainant's said note was procured to be deposited, and the said certificate of deposit issued as including such proceeds as the result of such false and fraudulent representations so made as alleged in the bill by the representative of the said American Bank & Trust Company, as trustee for the defendant Rome Insurance Company.

8. That the equities in this cause are with the complainant and he is entitled to the relief prayed and hereinafter decreed.

Therefore, upon consideration thereof, it is ordered, adjudged and decreed as follows:

35 (*a*) The said decree pro confesso entered against the said defendants and each of them on, to wit, the Rule Day in March, A. D. 1914, by the Clerk of this Court for want of demurrer, plea or answer, be and the same is hereby in all respects approved, ratified and confirmed.

(*b*) That the pretended contract of agreement made by the complainant with the said Rome Insurance Company and the American Bank & Trust Company, its trustee, providing for the sale and purchase of 15 shares of the capital stock of the said Rome Insurance Company, be and the same is hereby decreed to be wholly void, and of no effect as having been procured by the fraud, deceit, covin and guile of the said Rome Insurance Company and its trustee, the said American Bank & Trust Company.

(*c*) That the proceeds of complainant's said note, to wit, the sum of four hundred forty-one dollars, covered by and included in said certificate of deposit No. 316 now held by the defendant First National Bank of Rome are hereby decreed to be impressed with a trust in favor of the complainant and the same are adjudged to belong to him; that the said First National Bank of Rome is hereby declared and decreed to have no right, title, interest claim or demand of, in and to the said proceeds of the complainant's said note, or any part thereof, and the said defendant The Bank of Jasper be and it is hereby required and directed to pay the said proceeds over to the defendant.

(*d*) That the defendant, The Bank of Jasper, be and it is hereby perpetually enjoined from paying out the proceeds of the said note executed by the complainant and dated as aforesaid, to the said First National Bank of Rome or to any one for it.

(*e*) That the certificate of deposit No. 316 in so far as it covers and includes the proceeds derived from the said note executed
36 by the said complainant, and which certificate was issued by the said defendant, The Bank of Jasper, to the American Bank & Trust Company of Rome, Georgia, as trustee, dated the 22nd day of November A. D. 1911, and for the sum of four hundred dollars, be and the same is hereby decreed void and of no effect.

(*f*) That the defendant, The Bank of Jasper, do pay the costs in this case to be taxed by the Clerk of this Court.

Done, ordered, adjudged, and decreed at Chamber, at Jasper, Florida, this 14th day of July, A. D. 1914.

M. F. HORNE,
Judge.

Duly recorded in Circuit Court Minute Docket No. 11, page 271, this July 14th, 1914, public records of Hamilton County, Fla.

[SEAL.] M. P. HUNTER,
Clerk,
By C. S. FRINK,
D. C.

STATE OF FLORIDA,
Hamilton County:

I, M. P. Hunter, Clerk of the Circuit Court in and for said County, do hereby certify that the foregoing instrument is a true and correct copy of the Final Decree in the case of A. L. Wise vs. Rome Insurance Company, et al., as the same appears in Circuit Court Minute Docket No. 11, on page 271.

Witness my hand and official seal, this 21st day of July, 1914.

M. P. HUNTER,
Clerk,
By G. D. FRINK,
D. C.

37 *Final Decree.*

In Circuit Court, Third Judicial Circuit of Florida, in and for Hamilton County.

In Chancery.

J. B. WETHERINGTON, Complainant,

v.

ROME INSURANCE COMPANY, a Corporation of Rome, Georgia; American Bank & Trust Company, a Corporation of Rome, Georgia; First National Bank of Rome, Georgia, a Corporation, and The Bank of Jasper, of Jasper, Florida, a Corporation, Defendants.

Bill for Relief.

This cause coming on this day for final hearing upon the motion of counsel for complainant for the entry of final decree upon the amended bill of complaint taken as and for confessed by the said defendants and each of them, on, to-wit, the 2nd day of March, A. D. 1914, and the Court being advised in the premises, doth find as follows:

1. That service in the above entitled cause was had on the defendants, Rome Insurance Company, American Bank & Trust Company, and First National Bank of Rome, by publication returnable to February 21st, A. D. 1913.

2. That said non-resident defendants made two motions to quash service on them and this Court made two orders dated respectively

the 14th day of March, and the 3rd day of April, A. D. 1913, denying said defendants' motions to quash service.

3. That it has been made to appear to me by certified copies of defendants' said motions to quash service, the orders of this Court denying the same, the appeal entered therefrom to the Supreme Court of Florida, the assignment of errors, and the mandate
38 of said Supreme Court showing the affirmance of the orders made by this Court denying said motions to quash service in the case of B. F. Carter v. Rome Insurance Company, exhibit "C," et al., that in the appeal in the last named case the said orders of this Court were affirmed by the said Supreme Court.

4. That on the 10th day of April, A. D. 1913, Solicitors for Complainant and Solicitors for Defendants, Rome Insurance Company, American Bank & Trust Company, and First National Bank of Rome, the said defendants' name appearing only specially, entered into a stipulation and filed the same in this Court wherein it was stipulated that the proceedings in this cause should be stayed pending the prosecution of an appeal from the orders of the Court overruling the motions of said defendants to quash service in the case of B. F. Carter v. Rome Insurance Company, et al., which said cause was then on file and being prosecuted in this Court, and wherein it was further stipulated that the ultimate decision of the said appeal in the said case of B. F. Carter v. Rome Insurance Company, et al., should be decisive of the validity of the service by publication on the said defendants in this case.

5. That the said defendants and each of them failed to demur, plead to or answer the said amended bill of complaint on or before the Rule day in March, A. D. 1914, and each of the said defendants made default therein.

6. That the clerk of this Court entered a decree pro confesso against each and every of said defendants on the Rule Day in March, A. D. 1914, for failure of said defendants to file any demurrer, plea or answer to said amended bill of complaint and that the entry of said decree pro confesso by the said clerk was regular and proper under the rules and practice of this Court, and that the matters of the bill are proper to be decreed consequent upon such decree pro confesso.

39 7. That on, to-wit, the 23 day of November, A. D. 1911 the said complainant executed his note, as alleged in said amended bill, payable to his order, for the sum of Fifteen Hundred & no 100 Dollars, and the defendant, American Bank & Trust Company, as trustee for the defendant, Rome Insurance Company, and the complainant by agreement with the defendant, The Bank of Jasper, deposited the said note of the complainant with the said defendant The Bank of Jasper in its banking house in Hamilton County, Florida, and procured from the said defendant The Bank of Jasper a certificate of deposit No. 317, dated the 23rd day of No-

vember, A. D. 1911, and in which said certificate was included the proceeds of the said note has at all times since the deposit thereof remained and does still remain in the hands and custody of the said defendant, The Bank of Jasper, in its banking house in Hamilton County, Florida; that said note was executed by the complainant in payment of shares of the capital stock of the defendant, Rome Insurance Company, which said shares were wholly worthless and without value, and was procured by the defendants, Rome Insurance Company, and the American Bank & Trust Company, as its Trustee, by the false and fraudulent representations as set forth in the bill of complaint and the proceeds of complainant's said note was procured to be deposited, and the said certificate of deposit issued as including such proceeds as the result of such false and fraudulent representations so made as alleged in the bill by the representative of the said American Bank & Trust Company, as trustee for the defendant Rome Insurance Company.

8. That the equities in this cause are with the complainant and he is entitled to the relief prayed and hereinafter decreed.

Therefore, upon consideration thereof, it is ordered, adjudged and decreed as follows:

(*a*) The said decree pro confesso entered against the said defendants and each of them on, to-wit, the Rule Day in March, A. D. 1914, by the Clerk of this Court for want of demurrer, plea or answer, be and the same is hereby in all respects approved, ratified and confirmed.

(*b*) That the pretended contract of agreement made by the complainant with the said Rome Insurance Company and the American Bank & Trust Company, its trustee, providing for the sale and purchase of 50 shares of the capital stock of the said Rome Insurance Company, be and the same is hereby decreed to be wholly void, and of no effect as having been procured by the fraud, deceit, covin and guile of the said Rome Insurance Company, and its trustee, the said American Bank & Trust Company.

(*c*) That the proceeds of complainant's said note, to-wit, fourteen hundred twenty & no 100 dollars, covered by and included in said certificate of deposit No. 317 now held by the defendant First National Bank of Rome are hereby decreed to be impressed with a trust in favor of the complainant and the same are adjudged to belong to him; that the said First National Bank of Rome is hereby declared and decreed to have no right, title, interest claim or demand of, in and to the said proceeds of the complainant's said note, or any part thereof, and the said defendant The Bank of Jasper be and it is hereby required and directed to pay the said proceeds over to the complainant.

(*d*) That the defendant, The Bank of Jasper, be and it is hereby perpetually enjoined from paying out the proceeds of the said note

executed by the complainant and dated as aforesaid, to the said First National Bank of Rome or to any one for it.

(*e*) That the certificate of deposit No. 317 in so far as it covers and includes the proceeds derived from the said note executed
41 by the said complainant, and which certificate was issued by the said defendant, The Bank of Jasper, to the American Bank & Trust Company of Rome, Georgia, as trustee, dated the 23rd day of November, A. D. 1911, and for the sum of fourteen hundred and seventy dollars, be and the same is hereby decreed void and of no effect.

(*f*) That the defendant, The Bank of Jasper, do pay the costs in this case to be taxed by the Clerk of this Court.

Done, ordered, adjudged, and decreed at Chamber, at Jasper, Florida, this 14th day of July, A. D. 1914.

M. F. HORNE,
Judge.

Duly recorded in Circuit Court Minute Docket No. 11, page 283, this July 14th, 1914, public records of Hamilton County, Fla.

[SEAL.] M. P. HUNTER,
Clerk,
By C. S. FRINK,
D. C.

STATE OF FLORIDA,
Hamilton County:

I, M. P. Hunter, Clerk of the Circuit Court in and for said County, do hereby certify that the foregoing instrument is a true and correct copy of the Final Decree in the case of J. B. Wetherington vs. Rome Insurance Company, et al., as the same appears in Circuit Court Minute Docket No. 11, on page 283.

Witness my hand and official seal, this 21st day of July, 1914.

M. P. HUNTER,
Clerk,
By G. S. FRINK,
D. C.

42 *Final Decree.*

In Circuit Court, Third Judicial Circuit of Florida, in and for Hamilton County.

In Chancery.

W. M. O'CAIN, Complainant,

v.

ROME INSURANCE COMPANY, a Corporation of Rome, Georgia; American Bank & Trust Company, a Corporation of Rome, Georgia; First National Bank of Rome, Georgia, a Corporation, and The Bank of Jasper, of Jasper, Florida, a Corporation, Defendants.

Bill for Relief.

This cause coming on this day for final hearing upon the motion of counsel for complainant for the entry of final decree upon the amended bill of complaint taken as and for confessed by the said defendants and each of them, on, to-wit, the 2nd day of March, A. D. 1914, and the Court being advised in the premises, doth find as follows:

1. That service in the above entitled cause was had on the defendants, Rome Insurance Company, American Bank & Trust Company, and First National Bank of Rome, by publication returnable to February 21st, A. D. 1913.

2. That said non-resident defendants made two motions to quash service on them and this Court made two orders dated respectively the 14th day of March, and the 3rd day of April, A. D. 1913, denying said defendant's motions to quash service.

3. That it has been made to appear to me by certified copies of defendants' said motions to quash service, the orders of this Court denying the same, the appeal entered therefrom to the Supreme Court of Florida, the assignment of errors, and the mandate of said
43 Supreme Court showing the affirmance of the orders made by this Court denying said motions to quash service in the case of B. F. Carter v. Rome Insurance Company, exhibit "D," et al., that in the appeal in the last named case the said orders of this Court were affirmed by the said Supreme Court.

4. That on the 10th day of April, A. D. 1913, Solicitors for Complainant and Solicitors for Defendants, Rome Insurance Company, American Bank & Trust Company, and First National Bank of Rome, the said defendants' name appearing only specially, entered into a stipulation and filed the same in this Court wherein it was stipulated that the proceedings in this cause should be stayed pending the prosecution of an appeal from the orders of the Court over-

ruling the motions of said defendants to quash service in the case of B. F. Carter v. Rome Insurance Company, et al., which said cause was then on file and being prosecuted in this Court, and wherein it was further stipulated that the ultimate decision of the said appeal in the said case of B. F. Carter v. Rome Insurance Company, et al., should be decisive of the validity of the service by publication on the said defendants in this case.

5. That the said defendants and each of them failed to demur, plead to or answer the said amended bill of complaint on or before the Rule day in March, A. D. 1914, and each of the said defendants made default therein.

6. That the clerk of this Court entered a decree pro confesso against each and every of said defendants on the Rule Day in March, A. D. 1914, for failure of said defendants to file any demurrer, plea or answer to said amended bill of complaint and that the entry of said decree pro confesso by the said clerk was regular and proper under the rules and practice of this Court, and that the matters of the bill are proper to be decreed consequent upon such decree pro confesso.

44 7. That on, to-wit, the 30th day of November, A. D. 1911, the said complainant executed his note, as alleged in said amended bill, payable to his order, for the sum of Seven Hundred Fifty & no/100 Dollars, and the defendant, American Bank & Trust Company, as trustee for the defendant, Rome Insurance Company, and the complainant by agreement with the defendant, The Bank of Jasper, deposited the said note of the complainant with the said defendant The Bank of Jasper in its banking house in Hamilton County, Florida, and procured from the said defendant The Bank of Jasper a certificate of deposit No. 318, dated the 30th day of November, A. D. 1911, and in which said certificate was included the proceeds of the said note has at all times since the deposit thereof remained and does still remain in the hands and custody of the said defendant, The Bank of Jasper, in its banking house in Hamilton County, Florida; that said note was executed by the complainant in payment of shares of the capital stock of the defendant, Rome Insurance Company, which said shares were wholly worthless and without value, and was procured by the defendants, Rome Insurance Company, and the American Bank & Trust Company, as its Trustee, by the false and fraudulent representations as set forth in the bill of complaint and the proceeds of complainant's said note was procured to be deposited, and the said certificate of deposit issued as including such proceeds as the result of such false and fraudulent representations so made as alleged in the bill by the representative of the said American Bank & Trust Company, as trustee for the defendant Rome Insurance Company.

8. That the equities in this cause are with the complainant and he is entitled to the relief prayed and hereinafter decreed.

Therefore, upon consideration thereof, it is ordered, adjudged and decreed as follows:

45 (*a*) The said decree pro confesso entered against the said defendants and each of them on, to-wit, the Rule Day in March, A. D. 1914, by the Clerk of this Court for want of demurrer, plea or answer, be and the same is hereby in all respects approved, ratified and confirmed.

(*b*) That the pretended contract of agreement made by the complainant with the said Rome Insurance Company and the American Bank & Trust Company, its trustee, providing for the sale and purchase of 25 shares of the capital stock of the said Rome Insurance Company, be and the same is hereby decreed to be wholly void, and of no effect as having been procured by the fraud, deceit, covin and guile of the said Rome Insurance Company, and its trustee, the said American Bank & Trust Company.

(*c*) That the proceeds of complainant's said note, to-wit, the sum of seven hundred thirty-five dollars, covered by and included in said certificate of deposit No. 318 now held by the defendant First National Bank of Rome are hereby decreed to be impressed with a trust in favor of the complainant and the same are adjudged to belong to him; that the said First National Bank of Rome is hereby declared and decreed to have no right, title, interest claim or demand of, in and to the said proceeds of the complainant's said note, or any part thereof, and the said defendant The Bank of Jasper be and it is hereby required and directed to pay the said proceeds over to the complainant.

(*d*) That the defendant, The Bank of Jasper, be and it is hereby perpetually enjoined from paying out the proceeds of the said note executed by the complainant and dated as aforesaid, to the said First National Bank of Rome or to any one for it.

(*e*) That the certificate of deposit No. 318 in so far as it covers and includes the proceeds derived from the said note executed
46 by the said complainant, and which certificate was issued by the said defendant, The Bank of Jasper, to the American Bank & Trust Company of Rome, Georgia, as trustee, dated the 30th day of November, A. D. 1911, and for the sum of seven hundred fifty dollars, be and the same is hereby decreed void and of no effect.

(*f*) That the defendant, The Bank of Jasper, do pay the costs in this case to be taxed by the Clerk of this Court.

Done, ordered, adjudged, and decreed at Chamber, at Jasper, Florida, this 14th day of July, A. D. 1914.

M. F. HORNE,
Judge.

Duly recorded in Circuit Court Minute Docket No. 11, page 276, this July 14th, 1914, public records of Hamilton County, Fla.

[SEAL.]

M. P. HUNTER,
Clerk.

By C. S. FRINK,
D. C.

STATE OF FLORIDA,
Hamilton County:

I, M. P. Hunter, Clerk of the Circuit Court in and for said County, do hereby certify that the foregoing instrument is a true and correct copy of the Final Decree in the case of W. M. O'Cain vs. Rome Insurance Company et al., as the same appears in Circuit Court Minute Docket No. 11, on page 276.

Witness my hand and official seal, this 21st day of July, 1914.

M. P. HUNTER,
Clerk.

By G. S. FRINK,
D. C.

17 *Final Decree.*

In Circuit Court, Third Judicial Circuit of Florida, in and for Hamilton County.

In Chancery.

J. F. THOSSARD, Complainant,

v.

ROME INSURANCE COMPANY, a Corporation of Rome, Georgia, American Bank & Trust Company, a Corporation of Rome, Georgia, First National Bank of Rome, Georgia, a Corporation, and The Bank of Jasper, of Jasper, Florida, a Corporation, Defendants.

Bill for Relief.

This cause coming on this day for final hearing upon the motion of counsel for complainant for the entry of final decree upon the amended bill of complaint taken as and for confessed by the said defendants and each of them, on, to-wit, the 2nd day of March, A. D. 1914, and the Court being advised in the premises, doth find as follows:

1. That service in the above entitled cause was had on the defendants, Rome Insurance Company, American Bank & Trust Company, and First National Bank of Rome, by publication returnable to February 21st, A. D. 1913.

2. That said non-resident defendants made two motions to quash service on them and this Court made two orders dated respectively the 14th day of March, and the 3rd day of April, A. D. 1913, denying said defendants' motions to quash service.

3. That it has been made to appear to me by certified copies of defendants' said motions to quash service, the orders of this Court denying the same, the appeal entered therefrom to the Supreme Court of Florida, the assignment of errors, and the mandate
18 of said Supreme Court showing the affirmance of the orders made by this Court denying said motions to quash service in the case of B. F. Carter v. Rome Insurance Company, Exhibit "E," et al., that in the appeal in the last named case the said orders of this Court were affirmed by the said Supreme Court.

4. That on the 10th day of April, A. D. 1913, Solicitors for Complainant and Solicitors for Defendants, Rome Insurance Company, American Bank & Trust Company, and First National Bank of Rome, the said defendants' name appearing only specially, entered into a stipulation and filed the same in this Court wherein it was stipulated that the proceedings in this cause should be stayed pending the prosecution of an appeal from the orders of the Court overruling the motions of said defendants to quash service in the case of B. F. Carter v. Rome Insurance Company et al., which said cause was then on file and being prosecuted in this Court, and wherein it was further stipulated that the ultimate decision of the said appeal in the said case of B. F. Carter v. Rome Insurance Company et al., should be decisive of the validity of the service by publication on the said defendants in this case.

5. That the said defendants and each of them failed to demur, plead to or answer the said amended bill of complaint on or before the Rule day in March, A. D. 1914, and each of the said defendants made default therein.

6. That the clerk of this Court entered a decree pro confesso against each and every of said defendants on the Rule Day in March, A. D. 1914, for failure of said defendants to file any demurrer, plea or answer to said amended bill of complaint and that the entry of said decree pro confesso by the said clerk was regular and proper under the rules and practice of this Court, and that the matters of the bill are proper to be decreed consequent upon such decree pro confesso.

19 7. That on, to-wit, the 25th day of November, A. D. 1911, the said complainant executed his note, as alleged in said amended bill, payable to his order, for the sum of Three Hundred Dollars, and the defendant, American Bank & Trust Company, as trustee for the Defendant, Rome Insurance Company, and the complainant by agreement with the defendant, The Bank of Jasper, deposited the said note of the complainant with the said defendant The Bank of Jasper in its banking house in Hamilton County, Florida, and procured from the said defendant The Bank of Jasper a certificate of deposit No. 319, dated the 25 day of November, A. D. 1911, and in which said certificate was included the proceeds of the said note has at all times since the deposit thereof remained and does still remain in the hands and custody of the said defendant. The

Bank of Jasper, in its banking house in Hamilton County, Florida; that said note was executed by the complainant in payment of shares of the capital stock of the defendant, Rome Insurance Company, which said shares were wholly worthless and without value, and was procured by the defendants, Rome Insurance Company, and the American Bank & Trust Company, as its Trustee, by the false and fraudulent representations as set forth in the bill of complaint and the proceeds of complainant's said note was procured to be deposited, and the said certificate of deposit issued as including such proceeds as the result of such false and fraudulent representations so made as alleged in the bill by the representative of the said American Bank & Trust Company, as trustee for the defendant Rome Insurance Company.

8. That the equities in this cause are with the complainant and he is entitled to the relief prayed and hereinafter decreed.

Therefore, upon consideration thereof, it is ordered, adjudged and decreed as follows:

50 (*a*) The said decree pro confesso entered against the said defendants and each of them on, to-wit, the Rule Day in March, A. D. 1914, by the Clerk of this Court for want of demurrer, plea or answer, be and the same is hereby in all respects approved, ratified and confirmed.

(*b*) That the pretended contract of agreement made by the complainant with the said Rome Insurance Company and the American Bank & Trust Company, its trustee, providing for the sale and purchase of 10 shares of the capital stock of the said Rome Insurance Company, be and the same is hereby decreed to be wholly void, and of no effect as having been procured by the fraud, deceit, covin and guile of the said Rome Insurance Company, and its trustee, the said American Bank & Trust Company.

(*c*) That the proceeds of complainant's said note, to-wit, two hundred ninety-four dollars, covered by and included in said certificate of deposit No. 319 now held by the defendant First National Bank of Rome are hereby decreed to be impressed with a trust in favor of the complainant and the same are adjudged to belong to him; that the said First National Bank of Rome is hereby declared and decreed to have no right, title, interest claim or demand of, in and to the said proceeds of the complainant's said note, or any part thereof, and the said defendant The Bank of Jasper be and it is hereby required and directed to pay the said proceeds over to the complainant.

(*d*) That the defendant, The Bank of Jasper, be and it is hereby perpetually enjoined from paying out the proceeds of the said note executed by the complainant and dated as aforesaid, to the said First National Bank of Rome or to any one for it.

(*e*) That the certificate of deposit No. 319 in so far as it
51 covers and includes the proceeds derived from the said note executed by the said complainant, and which certificate was

issued by the said defendant, The Bank of Jasper, to the American Bank & Trust Company of Rome, Georgia, as trustee, dated the 25th day of November, A. D. 1911, and for the sum total of fifteen hundred fifty-eight & 20-100 dollars, be and the same is hereby decreed void and of no effect.

(f) That the defendant, The Bank of Jasper, do pay the costs in this case to be taxed by the Clerk of this Court.

Done, ordered, adjudged, and decreed at Chamber, at Jasper, Florida, this 14th day of July, A. D. 1914.

M. F. HORNE,
Judge.

Duly recorded in Circuit Court Minute Docket No. 11, page 279 this July 14th, 1914, public records of Hamilton County, Fla.

[SEAL.] M. P. HUNTER,
Clerk.

By C. S. FRINK,
D. C.

STATE OF FLORIDA,
Hamilton County:

I, M. P. Hunter, Clerk of the Circuit Court in and for said County, do hereby certify that the foregoing instrument is a true and correct copy of the Final Decree in the case of J. F. Thaggard vs. Rome Insurance Company, et al., as the same appears in Circuit Court Minute Docket No. 11, on page 279.

Witness my hand and official seal, this 21st day of July, 1914.

M. P. HUNTER,
Clerk.

By C. S. FRINK,
D. C.

52 *Final Decree.*

In Circuit Court, Third Judicial Circuit of Florida, in and for Hamilton County.

In Chancery.

B. F. CARTER, Complainant,

v.

ROME INSURANCE COMPANY, a Corporation, of Rome, Georgia; American Bank & Trust Company, a Corporation, of Rome, Georgia, and First National Bank, of Rome, a Corporation, of Rome, Georgia, and The Bank of Jasper, a Corporation, of Jasper, Florida, Defendants.

This cause coming on this day to be finally heard upon the motion of counsel for complainant for the entry of final decree upon the amended bill of complaint taken as and for confessed by the said

defendants and each of them on, to-wit, the 2nd day of March, A. D. 1914, and the Court being advised in the premises doth find as follows:

1. That on, to-wit, the 10th day of April, A. D. 1913, the defendants, Rome Insurance Company, American Bank & Trust Company, and the First National Bank of Rome, Georgia, entered their appeal to the Supreme Court of the State of Florida from two certain orders made by this Court dated respectively the 14th day of March, and the 3rd day of April, A. D. 1913, denying the motions of the said defendants to quash the service in this cause, said appeal being returnable before the said Supreme Court on the 10th day of June, A. D. 1913.

2. That the Supreme Court of the State of Florida, on, to-wit, the 9th day of December, A. D. 1913, rendered its decision upon said appeal so taken as aforesaid, and thereby affirmed the ruling of this Court denying the said motions of the said defendants to quash the service in said cause.

53 3. That thereafter, to-wit, on the 12th day of January, A. D. 1914, the mandate of said Supreme Court, in this cause on appeal, showing the affirmance of the orders denying defendants' motion to quash service, was filed in the office of the Clerk of this Court. Exhibit "F."

4. That the said defendants and each of them failed to demur, plead to or answer the said amended bill of complaint on or before the Rule Day in March, A. D. 1914, each of the said defendants made default therein.

5. That the clerk of this Court entered a decree pro confesso against each and every of said defendants on the Rule Day in March, A. D. 1914, for failure of said defendants to file any demurrer, plea, or answer to the said amended bill of complaint, and that the entry of said decree pro confesso by the said clerk was regular and proper under the rules and practice of this Court, and that the matters of the bill are proper to be decreed consequent upon such decree pro confesso.

6. That on, to-wit, the 25th day of November, 1911, the said complainant executed his note, as alleged in said amended bill, payable to his order, for the sum of Three Hundred Dollars, and the defendant American Bank & Trust Company, as Trustee for the defendant, Rome Insurance Company, and the complainant by agreement with the defendant, The Bank of Jasper, deposited the said note of the complainant with the defendant, The Bank of Jasper, at his Banking House in Hamilton County, Florida, and procured from said defendant, The Bank of Jasper, a certificate of deposit No. 319, dated the 25 day of November, A. D. 1911, and in which said certificate was included the proceeds of the said note of the complainant; that the proceeds of the said note has at all times since the deposit thereof remained and does still remain in the hands and custody of the said

defendant, The Bank of Jasper, in its Banking House in
54 Hamilton County, Florida; that the said note was executed by the complainant in payment for shares of the capital stock of the defendant, Rome Insurance Company, which said shares were wholly worthless and without value, and was procured by the defendants, Rome Insurance Company and the American Bank & Trust Company, as its Trustee, by the false and fraudulent representations as set forth in the bill of complaint and the proceeds of complainant's said note was procured to be deposited and the said certificate of deposit issued as including such proceeds as the result of such false and fraudulent representations so made as alleged in the bill by the representative of the said American Bank & Trust Company, as trustee for the defendant, Rome Insurance Company.

7. That the equities in this cause are with the complainant, and he is entitled to the relief prayed and hereinafter decreed.

Therefore, upon consideration thereof, it is ordered, adjudged and decreed as follows:

(*a*) The said decree pro confesso entered against the said defendants and each of them on, to-wit, the Rule Day in March, A. D. 1914, by the clerk of this Court, for want of demurrer, plea or answer, be and the same is hereby in all respects approved, ratified and confirmed.

(*b*) That the pretended contract of agreement made by the complainant with the said Rome Insurance Company, and the American Bank & Trust Company, its trustee, providing for the sale and purchase of ten shares of the capital stock of the said Rome Insurance Company, be and the same is hereby decreed to be wholly void, and of no effect as having been procured by the fraud, deceit, covin, and guile of the said Rome Insurance Company, and its trustee, the said American Bank & Trust Company.

55 (*c*) That the proceeds of the complainant's said note, to-wit, the sum of two hundred ninety-four dollars, covered by and included in said certificate of deposit No. 319 now held by the defendant, First National Bank of Rome, Georgia, are hereby decreed to be impressed with a trust in favor of the said complainant and the same are adjudged to belong to him; that the said First National Bank of Rome, Georgia, is hereby declared and decreed to have no right, title, interest, claim or demand of, in and to the said proceeds of the complainant's said note or any part thereof, and the said The Bank of Jasper be and it is hereby required and directed to pay the said proceeds over to the complainant.

(*d*) That the defendant, The Bank of Jasper, be and it is hereby perpetually enjoined from paying out the proceeds of the said note executed by the complainant and dated as aforesaid, to the said defendant, First National Bank of Rome, Georgia, or to any one for it.

(*e*) That the certificate of deposit No. 319 in so far as it covers and includes the proceeds derived from the said note executed by the com-

plainant, and which certificate was issued by the said The Bank of Jasper to the American Bank & Trust Company, of Rome, Georgia, as Trustee, dated 25 day of November, A. D. 1911, and for the total sum of fifteen hundred fifty-eight and 20/100 dollars be and the same is hereby decreed to be void and of no effect.

It is further ordered and decreed herein that the defendant herein, The Bank of Jasper, pay the cost of this suit to be taxed by the Clerk of this Court.

Done, ordered, adjudged, and decreed at Chamber, at Jasper, Florida, this the 14th day of July, A. D. 1914.

M. F. HORNE,
Judge.

56 Duly recorded in Circuit Court Minute Docket No. 11, page 291, this July 14th, 1914, public records of Hamilton County, Fla.

[SEAL.] M. P. HUNTER,
Clerk,
By G. S. FRINK,
D. C.

STATE OF FLORIDA,
Hamilton County:

I, M. P. Hunter, Clerk of the Circuit Court in and for said County, do hereby certify that the foregoing instrument is a true and correct copy of the Final Decree in the case of B. F. Carter versus Rome Insurance Company, et al., as appears on record in Circuit Court Minute Docket No. 11, page 291.

Witness my hand and official seal, this July 21st, 1914.

[SEAL.] M. P. HUNTER,
Clerk,
By G. S. FRINK,
D. C.

Final Decree.

In Circuit Court, Third Judicial Circuit of Florida, in and for Hamilton County.

In Chancery.

C. W. SMITH, Complainant,

v.

ROME INSURANCE COMPANY, a Corporation of Rome, Georgia; American Bank & Trust Company, a Corporation of Rome, Georgia; First National Bank of Rome, Georgia, a Corporation, and The Bank of Jasper, of Jasper, Florida, a Corporation, Defendants.

Bill for Relief.

This cause coming on this day for final hearing upon the motion of counsel for complainant for the entry of final decree upon the

amended bill of complaint taken as and for confessed by the said defendants and each of them, on, to-wit, the 2nd day of March,
57 A. D. 1914, and the Court being advised in the premises, doth find as follows:

1. That service in the above entitled cause was had on the defendants, Rome Insurance Company, American Bank & Trust Company, and First National Bank of Rome, by publication returnable to February 21st, A. D. 1913.

2. That said non-resident defendants made two motions to quash service on them and this Court made two orders dated respectively the 11th day of March, and the 3rd day of April, A. D. 1913, denying said defendant's motions to quash service.

3. That it has been made to appear to me by certified copies of defendants' said motions to quash service, the orders of this Court denying the same, the appeal entered therefrom to the Supreme Court of Florida, the assignment of errors, and the mandate of said Supreme Court showing the affirmance of the orders made by this Court denying said motions to quash service in the case of B. F. Carter v. Rome Insurance Company, et al., that in the appeal in the last named case the said orders of this Court were affirmed by the said Supreme Court.

4. That on the 10th day of April, A. D. 1913, Solicitors for Complainant and Solicitors for Defendants, Rome Insurance Company, American Bank & Trust Company, and First National Bank of Rome, the said defendants named appearing only specially, entered into a stipulation and filed the same in this Court wherein it was stipulated that the proceedings in this cause should be stayed pending the prosecution of an appeal from the orders of the Court overruling the motions of said defendants to quash service in the case of B. F. Carter v. Rome Insurance Company, et al., which said cause was then on file and being prosecuted in this Court, and wherein it was further stipulated that the ultimate decision of the said
58 appeal in the said case of B. F. Carter v. Rome Insurance Company, et al., should be decisive of the validity of the service by publication on the said defendants in this case.

5. That the said defendants and each of them failed to demur, plead to or answer the said amended bill of complaint on or before the Rule day in March, A. D. 1914, and each of the said defendants made default therein.

6. That the clerk of this Court entered a decree pro confesso against each and every of said defendants on the Rule Day in March, A. D. 1914, for failure of said defendants to file any demurrer, plea or answer to said amended bill of complaint and that the entry of said decree pro confesso by the said clerk was regular and proper under the rules and practice of this Court, and that the matters of the bill are proper to be decreed consequent upon such decree pro confesso,

7. That on, to-wit, the 25th day of November, A. D. 1911, the said complainant executed his note, as alleged in said amended bill, payable to his order, for the sum of Nine Hundred and Ninety Dollars, and the defendant, American Bank & Trust Company, as trustee for the defendant, Rome Insurance Company, and the complainant by agreement with the defendant, The Bank of Jasper, deposited the said note of the complainant with the said defendant The Bank of Jasper in its banking house in Hamilton County, Florida, and procured from the said defendant The Bank of Jasper a certificate of deposit No. 319, dated the 25th day of November, A. D. 1911, and in which said certificate was included the proceeds of the said note of the complainant; that the proceeds of the said note has at all times since the deposit thereof remained and does still remain in the hands and custody of the said defendant, The Bank of Jasper, in its banking house in Hamilton County, Florida; that said note was executed by
59 the complainant in payment of shares of the capital stock of the defendant, Rome Insurance Company, which said shares were wholly worthless and without value, and was procured by the defendants, Rome Insurance Company, and the American Bank & Trust Company, as its Trustee, by the false and fraudulent representations as set forth in the bill of complaint and the proceeds of complainant's said note was procured to be deposited, and the said certificate of deposit issued as including such proceeds as the result of such false and fraudulent representations so made as alleged in the bill by the representative of the said American Bank & Trust Company, as trustee for the defendant Rome Insurance Company.

8. That the equities in this cause are with the complainant and he is entitled to the relief prayed and hereinafter decreed.

Therefore, upon consideration thereof, it is ordered, adjudged and decreed as follows:

(*a*) The said decree pro confesso entered against the said defendants and each of them on, to-wit, the Rule Day in March, A. D. 1914, by the Clerk of this Court for want of demurrer, plea or answer, be and the same is hereby in all respects approved, ratified and confirmed.

(*b*) That the pretended contract of agreement made by the complainant with the said Rome Insurance Company and the American Bank & Trust Company, its trustee, providing for the sale and purchase of 33 shares of the capital stock of the said Rome Insurance Company, be and the same is hereby decreed to be wholly void, and of no effect as having been procured by the fraud, deceit, covin and guile of the said Rome Insurance Company, and its trustee, the said American Bank & Trust Company.

60 (*c*) That the proceeds of complainant's said note, to-wit, the sum of nine hundred seventy & 20/100 dollars, covered by and included in said certificate of deposit No. 319, now held by the defendant First National Bank of Rome, are hereby decreed to be impressed with a trust in favor of the complainant and the same

are adjudged to belong to him; that the said First National Bank of Rome is hereby declared and decreed to have no right, title, interest, claim or demand of, in and to the said proceeds of the complainant's said note, or any part thereof, and the said defendant, The Bank of Jasper, be and it is hereby required and directed to pay the said proceeds over to the complainant.

(*d*) That the defendant, The Bank of Jasper, be and it is hereby perpetually enjoined from paying out the proceeds of the said note executed by the complainant and dated as aforesaid, to the said First National Bank of Rome or to any one for it.

(*e*) That the certificate of deposit No. 319 in so far as it covers and includes the proceeds derived from the said note executed by the said complainant, and which certificate was issued by the said defendant, The Bank of Jasper, to the American Bank & Trust Company of Rome, Georgia, as trustee, dated the 25th day of November, A. D. 1911, and for the sum total of fifteen hundred fifty-eight and 20/100 dollars, be and the same is hereby decreed void and of no effect.

(*f*) That the defendant, The Bank of Jasper, do pay the costs in this case to be taxed by the Clerk of this Court.

Done, ordered, adjudged and decreed at Chambers, at Jasper, Florida, this 14th day of July, A. D. 1914.

M. F. HORNE,
Judge.

61 Duly recorded in Circuit Court Minute Docket No. 11, page 273, this July 14th, 1914, public records of Hamilton County, Fla.

M. P. HUNTER,
Clerk.
[SEAL.]
By G. S. FRINK,
D. C.

STATE OF FLORIDA,
Hamilton County:

I, M. P. Hunter, Clerk of the Circuit Court in and for said County, do hereby certify that the foregoing instrument is a true and correct copy of the Final Decree in the case of C. W. Smith, vs. Rome Insurance Company et al., as the same appears in Circuit Court Minute Docket No. H, on page 273.

Witness my hand and official seal, this 21st day of July, 1914.

M. P. HUNTER,
Clerk.
By G. S. FRINK,
D. C.

Indorsed: Additional Pleas of Defendant. Filed August 3, 1914, E. D. Dodge, clerk.

Demurrer to Additional Pleas.

In the District Court of the United States in and for the Southern District of Florida.

FIRST NATIONAL BANK OF ROME, GEORGIA, a Corporation,

vs.

THE BANK OF JASPER, a Corporation.

Comes now the plaintiff in the above entitled cause, by Kay & Doggett, its attorneys, and demurs severally to the additional pleas filed by the defendant herein on August 3rd, 1914, to the first, second, third, fourth and fifth counts of plaintiff's declaration,
62 because each of said pleas is severally bad in substance; and for substantial matters of law to be argued severally as to each of said pleas, the plaintiff assigns the following:

1. Said plea sets up no defense to the cause of action alleged in said count.

2. It appears by said plea that said Circuit Court of Hamilton County Florida, never, at any time during the progress of said alleged chancery suit, had or obtained jurisdiction over the plaintiff herein.

3. Said chancery suit was an action in personam, in which constructive service upon a resident of a State other than that in which the suit was brought was ineffectual to give the Court jurisdiction over a person so served.

4. Said plea does not allege or show that personal service in said chancery suit was ever at any time had upon the plaintiff herein, or that said plaintiff herein ever at any time made any sort of a general appearance in said cause.

5. Said plea affirmatively shows that in said chancery suit no personal service was had upon the plaintiff herein, and that the plaintiff herein at no time during the progress of said chancery suit entered any sort of a general appearance in said chancery suit.

6. Said plea does not allege or show that the plaintiff herein ever at any time waived, in any manner, shape or form, want of jurisdiction of said Court in said Chancery suit over the plaintiff herein.

7. Jurisdiction could not be assumed or exercised by the Court in said chancery suit merely because the subject matter of the suit was within the power of the Court.

63 8. No decree entered in said chancery suit could bind anyone not personally served with process, or who did not appear

9. No decree entered in said chancery suit could effect the rights of the plaintiff herein arising out of the certificate of deposit set up in said count.

KAY & DOGGETT,
Attorneys for Plaintiff.

I hereby certify that in my opinion the foregoing demurrer is well founded in point of law.

JOHN L. DOGGETT,
Attorney for Plaintiff.

STATE OF FLORIDA,
County of Duval, ss:

Personally appeared before me, a Notary Public, in and for the State of Florida at large, one Henry C. Clark, who being by me first duly sworn, deposes and says that he is of counsel for plaintiff in the foregoing cause, and duly authorized to make this affidavit, and that the foregoing demurrer is not interposed for the purpose of delay.

HENRY C. CLARK.

Sworn to and subscribed before me this the 5th day of September, A. D. 1914.

E. P. OWEN, JR.,
[SEAL.] *Notary Public, State of Florida, at Large.*

My commission expires February 17th, 1917.

Filed Sept. 7, 1914.
E. D. DODGE,
Clerk.

61 In District Court of United States, Southern District of Florida.

FIRST NATIONAL BANK OF ROME

vs.

THE BANK OF JASPER, FLORIDA.

Comes now the defendant by its undersigned attorneys and joins in the demurrer of the plaintiff to the plea filed August 3rd, 1914, to the first, second, third, fourth and fifth counts of plaintiff's declaration.

CARTER & McCOLLUM,
S. S. SANFORD,
Attorneys for Defendant.

* * * * * * *

Order of Court.

In the District Court of the United States in and for the Southern District of Florida.

FIRST NATIONAL BANK OF ROME, GEORGIA

vs.

THE BANK OF JASPER.

This cause coming on to be heard upon the undisposed of demurrers herein, and the same having been submitted, and the Court being advised in the premises, upon consideration thereof, it is hereby ordered and adjudged:

1st. That the plaintiff's demurrers to the defendant's additional pleas filed August 3rd, 1914, to the first, second, third, fourth and fifth counts of plaintiff's declaration be and each of them are hereby overruled.

2nd. That the defendant's demurrers to the plaintiff's additional and fifth replication to the defendant's sixth pleas to the first, second, third, fourth and fifth counts of plaintiff's declaration, and
65 defendant's demurrers to the plaintiff's additional and sixth replications to the defendant's eighth pleas to the first, second, third, fourth and fifth counts of plaintiff's declaration be and each of them are hereby overruled.

3rd. That the defendant's demurrers to the plaintiff's third, fourth and fifth replications to the defendant's seventh pleas to the first, second, third, fourth and fifth counts of plaintiff's declaration be and each of them are hereby overruled.

Done and ordered this 12th day of January, A. D. 1915.

RHYDON M. CALL,
Judge.

Filed Jan. 12, 1915.

E. D. DODGE,
Clerk.

Motion.

In the District Court of the United States in and for the Southern District of Florida.

FIRST NATIONAL BANK OF ROME, GEORGIA, Plaintiff,

vs.

THE BANK OF JASPER, FLORIDA, Defendant.

Comes now the Plaintiff in the above entitled cause by Kay & Doggett, its attorneys, and moves the Court for leave to file in said cause replications to Defendant's Additional Pleas heretofore filed in said cause.

KAY & DOGGETT,
Attorneys for Plaintiff.

Filed June 15, 1915.
W. L. DEVORE,
Clerk.

66 We hereby consent to the above motion, saying unto ourselves any and all exceptions or objections to the substance of said replications.

CARTER & McCOLLUM,
Attorneys for Defendant.

Order of Court.

The above motion coming on to be heard and having been submitted, upon consideration thereof it is hereby ordered and adjudged that said motion be, and the same is hereby granted and the defendant given until Rule Day in July, 1915, to plead thereto as advised.
Done and ordered this 15th day of June, A. D. 1915.

RHYDON M. CALL,
Judge.

Replications to Additional Pleas of Defendant.

In the District Court of the United States in and for the Southern District of Florida.

FIRST NATIONAL BANK OF ROME, GEORGIA, Plaintiff,

vs.

THE BANK OF JASPER, FLORIDA, Defendant.

Comes now the plaintiff in the above entitled cause, by Kay & Doggett, its attorneys, and for replication to defendant's additional plea to the first count of plaintiff's declaration, says:

That said Chancery suit in said plea mentioned was an action in personam; that no personal service in said chancery suit was ever at any time had upon the plaintiff herein; that the plaintiff herein did not at any time or in any way make any sort of a general appearance in said chancery suit; that the plaintiff herein did not at any time waive, in any manner, shape or form, want of jurisdiction of the Court in said chancery suit over the plaintiff herein; that the plaintiff herein in no way appeared in said chancery suit except only specially, solely and only to contest the pretended service by publication attempted to be made in said chancery suit upon the plaintiff herein; that a copy of the first of said motions to quash service which were filed by the plaintiff herein in said chancery suit is hereto attached and marked "Exhibit A" and hereby made a part hereof; that upon Complainant in said chancery suit amending his Bill of Complaint therein, the plaintiff herein filed in said chancery suit said second motion to quash service, copy of which said second motion to quash service is hereto attached, marked "Exhibit B," and hereby made a part hereof; that upon the denial of said motions to quash service, the parties named in said chancery suit, through their respective counsel entered into said stipulation mentioned in said final decree, and unsigned copy of which stipulation is hereto attached, marked "Exhibit C," and hereby made a part hereof; that a copy of the complete transcript of record in said chancery suit of B. F. Carter vs. Rome Insurance Company, et al., as the same was filed in the Supreme Court of the State of Florida, is hereto attached, marked "Exhibit D," and hereby made a part hereof; that a copy of the opinion of the Supreme Court of Florida in said chancery suit of B. F. Carter vs. Rome Insurance Company, et al., is hereto attached, marked "Exhibit E," and hereby made a part hereof; that a copy of the opinion of the Supreme Court of Florida in said chancery suit of J. H. Corlett vs. Rome Insurance Company, et al., is hereto attached, marked "Exhibit F"; that a copy of the mandate of the Supreme Court of Florida in said Chancery suit of B. F. Carter vs. Rome Insurance Company, et al., is hereto attached, marked "Exhibit G" and hereby made a part hereof; that after said opinions of said Supreme Court of Florida were announced the plaintiff herein took no further part whatsoever in said chancery suit of C. L. Adams vs. Rome Insurance Company, et al nor in said Chancery suit of B. F. Carter vs. Rome Insurance Company, et al., wherefore this plaintiff says that no decree entered in said chancery suit of C. L. Adams vs. Rome Insurance Company et al., could affect or take away any of the rights of the plaintiff herein, arising out of the certificate of deposit herein sued upon.

And for replication to defendant's additional plea to the second count of plaintiff's declaration, plaintiff says:

That said chancery suit in said plea mentioned was an action in personam; that no personal service in said chancery suit was ever at any time had upon the plaintiff herein; that the plaintiff herein did not at any time or in any way make any sort of a general appearance in said chancery suit; that the plaintiff herein did not at any time waive, in any manner, shape or form, want of jurisdiction of the

Court in said Chancery suit over the plaintiff herein; that the plaintiff herein in no way appeared in said chancery suit except only specially, solely and only to contest the pretended service by publication attempted to be made in said chancery suit upon the plaintiff herein; that a copy of the first of said motions to quash service which were filed by the plaintiff herein in said chancery suit is hereto attached and marked "Exhibit H" and hereby made a part hereof; that upon Complainant in said chancery suit amending his Bill of Complaint therein, the plaintiff herein filed in said chancery suit said second motion to quash service, copy of which said second motion to quash service is attached hereto; marked "Exhibit J" and hereby made a part hereof; that upon the denial of said motions to quash service, the parties named in said chancery suit, through their respective counsel, entered into said stipulation mentioned in said final decree, an unsigned copy of which stipulation is hereto attached, marked "Exhibit K," and hereby made a part hereof; that a copy of the complete transcript of record in said chancery suit of B. F. Carter vs. Rome Insurance Company, et al., as the same was filed in the Supreme Court of Florida, is hereto attached, marked "Exhibit D" and hereby made a part hereof; that a copy of the opinion of the Supreme Court of Florida, in said Chancery suit of B. F. Carter vs. Rome Insurance Company, et al., is hereto attached, marked "Exhibit E," and hereby made a part hereof; that a copy of the opinion of the Supreme Court of Florida, in said chancery suit of J. H. Corbett vs. Rome Insurance Company, et al., is hereto attached, marked "Exhibit F"; that a copy of the mandate of the Supreme Court of Florida in said chancery suit of B. F. Carter vs. Rome Insurance Company, et al., is hereto attached, marked "Exhibit G," and hereby made a part hereof; that after said opinions of said Supreme Court of Florida were announced, the plaintiff herein took no further part whatsoever in said chancery suit of A. L. Wise vs. Rome Insurance Company, et al., nor in said chancery suit of B. F. Carter vs. Rome Insurance Company, et al., wherefore this plaintiff says that no decree entered in said chancery suit of A. L. Wise vs. Rome Insurance Company, et al., could affect or take away any of the rights of the plaintiff herein, arising out of the certificate of deposit herein sued upon.

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And for replication to defendant's additional plea to the third count of plaintiff's declaration, plaintiff says:

That said Chancery suit in said plea mentioned was an action in personam; that no personal service in said chancery suit was ever at any time had upon the plaintiff herein; that the plaintiff herein did not at any time or in any way make any sort of a general appearance in said Chancery suit; that the plaintiff herein did not at any time waive, in any manner, shape *of* form, want of jurisdiction of the Court in said Chancery suit over the plaintiff herein; that the plaintiff herein in no way appeared in said Chancery suit except only specially solely and only to contest the pretended service by publication attempted to be made in said Chancery suit upon the plaintiff herein; that a copy of the first of said motions to quash service which were filed by the plain-

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tiff herein in said Chancery suit is hereto attached, and marked "Exhibit L" and hereby made a part thereof; that upon Complainant in said Chancery suit amending his Bill of Complaint herein, the plaintiff herein filed in said Chancery suit said second motion to quash service, copy of which said second motion to quash service is attached hereto, marked "Exhibit M" and hereby made a part hereof; that upon the denial of said motions to quash service, the parties named in said Chancery suit, through their respective counsel, entered into said stipulation mentioned in said final decree, an unsigned copy of which stipulation is hereto attached, marked "Exhibit N," and hereby made a part hereof; that a copy of the complete transcript of record in said Chancery suit of B. F. Carter vs. Rome Insurance Company et al., as the same was filed in the Supreme Court of the State of Florida, is hereto attached, marked "Exhibit D," and hereby made a part hereof; that a copy of the opinion of the Supreme Court of Florida in said Chancery suit of B. F. Carter vs. Rome Insurance Company et al., is hereto attached, marked "Exhibit E" and hereby made a part hereof; that a copy of the opinion of the Supreme Court of Florida in said Chancery suit of J. H. Corbett vs. Rome Insurance Company et al., is hereto attached, marked "Exhibit F"; that a copy of the mandate of the Supreme Court of Florida in said Chancery suit of B. F. Carter vs. Rome Insurance Company et al., is hereto atached, marked "Exhibit G" and hereby made a part hereof; that after said opinion of said Supreme Court of Florida were announced, the plaintiff herein took no further part whatsoever in said Chancery suit of J. B. Wetherington vs. Rome Insurance Company, et al., nor in said
71 Chancery suit of B. F. Carter vs. Rome Insurance Company et al., wherefore this plaintiff says that no decree entered in said Chancery suit of J. B. Wetherington vs. Rome Insurance Company et al., could affect or take away any of the rights of the plaintiff herein, arising out of the certificate of deposit herein sued upon.

And for replication to defendant's additional plea to the fourth count of plaintiff's declaration, plaintiff says:

That said Chancery suit in said plea mentioned was an action in personam; that no personal service in said Chancery suit was ever at any time had upon the plaintiff herein; that the plaintiff herein did not at any time or in any way make any sort of a general appearance in said Chancery suit; that the plaintiff herein did not at any time waive, in any manner, shape or form, want of jurisdiction of the Court in said Chancery suit over the plaintiff herein; that the plaintiff herein in no way appeared in said Chancery suit except only specially, solely and only to contest the pretended service by publication attempted to be made in said Chancery suit upon the plaintiff herein; that a copy of the first of said motions to quash service which were filed by the plaintiff herein in said Chancery suit is hereto attached and marked "Exhibit P" and hereby made a part thereof; that upon Complainant in said Chancery suit amending his Bill of Complaint therein, the plaintiff herein filed in said Chancery suit said second motion to quash service, copy of which said second motion to quash service is attached hereto, marked "Ex-

hibit Q," and hereby made a part hereof; that upon the denial of said motions to quash service that parties named in said Chancery suit through their respective counsel, entered into said stipulation mentioned in said final decree, an unsigned copy of which stipulation is hereto attached, marked "Exhibit R" and hereby made a part hereof; that a copy of the complete transcript of record in
72 said Chancery suit of B. F. Carter vs. Rome Insurance Company et al., as the same was filed in the Supreme Court of Florida, is hereto attached, marked "Exhibit D," and hereby made a part hereof; that a copy of the opinion of the Supreme Court of Florida in said Chancery suit of B. F. Carter vs. Rome Insurance Company et al., is hereto attached, marked "Exhibit E," and hereby made a part hereof; that a copy of the opinion of the Supreme Court of the State of Florida in said Chancery suit of J. H. Corbett vs. Rome Insurance Company et al., is hereto attached, marked "Exhibit F"; that a copy of the mandate of the Supreme Court of Florida in said Chancery suit of B. F. Carter vs. Rome Insurance Company et al., is hereto attached, marked "Exhibit G" and hereby made a part hereof; that after said opinions of said Supreme Court of Florida were announced, the plaintiff herein took no further part whatsoever in said Chancery suit of W. M. O'Cain vs. Rome Insurance Company et al., now in said Chancery suit of B. F. Carter vs. Rome Insurance Company et al., wherefore this plaintiff says that no decree entered in said Chancery suit of W. M. O'Cain vs. Rome Insurance Company et al., could affect or take away any of the rights of the plaintiff herein, arising out of the certificate of deposit herein sued upon.

And for replication to defendant's first additional plea to the fifth count of plaintiff's declaration, plaintiff says:

That said Chancery suit in said plea mentioned was an action in personam; that no personal service in said Chancery suit was ever at any time time had upon the plaintiff herein; that the plaintiff herein did not at any time or in any way make any sort of a general appearance in said Chancery suit; that the plaintiff herein did not at any time waive, in any manner, shape or form, want of jurisdiction of the Court in said Chancery suit over the plaintiff herein; that the plaintiff herein in no way appeared in said
73 Chancery suit except only specially, solely and only to contest the pretended service by publication attempted to be made in said Chancery suit upon the plaintiff herein; that a copy of the first of said motions to quash service which were filed by the plaintiff herein in said Chancery suit is hereto attached and marked "Exhibit S," and hereby made a part hereof; that upon Complainant in said Chancery suit amending his Bill of Complaint therein, the plaintiff herein filed in said Chancery suit said second motion to quash service, copy of which said second motion to quash service is attached hereto, marked "Exhibit T" and hereby made a part hereof; that upon the denial of said motions to quash service, the parties named in said Chancery suit, through their respective counsel, entered into said stipulation mentioned in said final decree,

an unsigned copy of which stipulation is hereto attached, marked "Exhibit U," and hereby made a part hereof; that a copy of the complete transcript of record in said Chancery suit of B. F. Carter vs. Rome Insurance Company et al., as the same was filed in the Supreme Court of the State of Florida, is hereto attached, marked "Exhibit D," and hereby made a part hereof; that a copy of the opinion of the Supreme Court of Florida in said Chancery suit of B. F. Carter vs. Rome Insurance Company et al., is hereto attached, marked "Exhibit E," and hereby made a part hereof; that a copy of the opinion of the Supreme Court of Florida in said Chancery suit of J. H. Corbett vs. Rome Insurance Company et al., is hereto attached, marked "Exhibit F," that a copy of the mandate of the Supreme Court of Florida in said Chancery suit of B. F. Carter vs. Rome Insurance Company et al., is hereto attached, marked "Exhibit G," and hereby made a part hereof; that after said opinions of said Supreme Court of Florida were announced, the plaintiff herein took no further part whatsoever in said Chancery suit of J. F. Thaggard vs. Rome Insurance Company et al., now in said Chancery suit of B. F. Carter vs. Rome Insurance Company
71 et al., wherefore this plaintiff says that no decree entered in said Chancery suit of J. F. Thaggard vs. Rome Insurance Company et al., could affect or take away any of the rights of the plaintiff herein, arising out of the certificate of deposit herein sued upon.

And for replication to defendant's second additional plea to the fifth count of plaintiff's declaration, plaintiff says:

That said Chancery suit in said plea mentioned was an action in personam, that no personal service in said Chancery suit was ever at any time had upon the plaintiff herein; that the plaintiff herein did not at any time or in any way make any sort of a general appearance in said chancery suit; that the plaintiff herein did not at any time waive, in any manner, shape *of* form, want of jurisdiction of the Court in said Chancery suit over the plaintiff herein; that the plaintiff herein in no way appeared in said chancery suit except only specially, solely and only to contest the pretended service by publication attempted to be made in said Chancery suit upon the plaintiff herein; that a copy of the complete transcript of record in said Chancery suit, as the same was filed in the Supreme Court of the State of Florida, is hereto attached, marked "Exhibit D," and hereby made a part hereof; that a copy of the opinion of the Supreme Court of Florida in said Chancery suit is hereto attached, marked "Exhibit E," and hereby made part hereof; that a copy of the opinion of the Supreme Court of Florida in said Chancery suit J. H. Corbett vs. Rome Insurance Company et al., is hereto attached, marked Exhibit F; that a copy of the mandate of the Supreme Court of Florida in said Chancery suit of B. F. Carter vs. Rome Insurance Company et al., is hereto attached, marked "Exhibit G," and hereby made a part hereof; that after said opinion of said Supreme Court of Florida was announced, the plaintiff herein took no further part whatsoever in said Chancery suit of

B. F. Carter vs. Rome Insurance Company et al., wherefore
75 this plaintiff says that no decree entered in said Chancery suit of B. F. Carter vs. Rome Insurance Company et al., could affect or take away any of the rights of the Plaintiff herein arising out of the certificate of deposit herein sued upon.

And for replication to defendant's third additional plea to the fifth count of plaintiff's declaration, plaintiff says:

That said Chancery suit in said plea mentioned was an action in personam; that no personal service in said Chancery suit was ever at any time had upon the plaintiff herein; that the plaintiff herein did not at any time or in any way make any sort of a general appearance in said Chancery suit; that the plaintiff herein did not at any time waive, in any manner, shape or form, want of jurisdiction of the Court in said Chancery suit over the plaintiff herein; that the plaintiff herein in no way appeared in said Chancery suit except only specially, solely and only to contest the pretended service by publication attempted to be made in said Chancery suit upon the plaintiff herein; that a copy of the first of said motions to quash service which were filed by the plaintiff herein in said Chancery suit is hereto attached and marked, "Exhibit V," and hereby made a part hereof; that upon Complainant in said Chancery suit amending his Bill of Complaint therein, the plaintiff herein filed in said Chancery suit said second motion to quash service, copy of which said second motion to quash service is attached hereto, marked "Exhibit W," and hereby made a part hereof; that upon the denial of said motions to quash service, the parties named in said Chancery suit, through their respective counsel, entered into said stipulation mentioned in said final decree, an unsigned copy of which stipulation is hereto attached, marked "Exhibit X," and hereby made a part hereof; that a copy of the complete transcript of record in said Chancery suit of

B. F. Carter vs. Rome Insurance Company, et al., as the same
76 was filed in the Supreme Court of Florida, is hereto attached, marked "Exhibit D," and hereby made a part hereof; that a copy of the opinion of the Supreme Court of Florida in said Chancery suit of B. F. Carter vs. Rome Insurance Company, et al., is hereto attached, marked "Exhibit E," and hereby made a part hereof; that a copy of the opinion of the Supreme Court of Florida in said Chancery suit of J. H. Corbett vs. Rome Insurance Company, et al., is hereto attached, marked "Exhibit F;" that a copy of the mandate of the Supreme Court of Florida in said Chancery suit of B. F. Carter vs. Rome Insurance Company, et al., is hereto attached, marked "Exhibit G," and hereby made a part hereof; that after said opinions of said Supreme Court of Florida were announced, the plaintiff herein took no further part whatsoever in said Chancery suit of C. W. Smith vs. Rome Insurance Company, et al., now in said Chancery suit of B. F. Carter vs. Rome Insurance Company, et al., wherefore this plaintiff says that no decree entered in said Chancery suit of C. W. Smith vs. Rome Insurance Company, et al., could affect or take away any of the rights of the plaintiff herein, arising out of the certificate of deposit herein sued upon.

KAY & DOGGETT,
Attorneys for Plaintiff.

77 *Special Appearance to Quash Pretended Service by Publication on Rome Insurance Company, American Bank & Trust Company, Trustee, and First National Bank of Rome, Georgia.*

In the Circuit Court of Florida, Third Judicial Circuit, in and for Hamilton County, Florida.

In Chancery.

C. L. ADAMS, Complainant,

vs.

ROME INSURANCE COMPANY et al., Defendants.

Come now defendants, Rome Insurance Company; American Bank and Trust Company, Trustee; and First National Bank of Rome, Georgia, by Kay and Doggett, their Solicitors and Counsel, and not appearing generally, but appearing specially, solely and only, and limiting this appearance to what, in contemplation of law, amounts only and solely to special appearance for the purpose of quashing the attempted and pretended service herein, to that end do hereby move to quash said service on the following grounds, to-wit:

1st. Because, on account of the attempted and pretended service by publication, the Court does not acquire jurisdiction of said defendants.

2nd. Because said service is defective and not such as is required by law, in that the defendants are foreign corporation- not resident in Florida, and have not received personal service of process herein in the State of Florida, and to vacate and hold said pretended and attempted service by publication upon these defendants to be for naught; and these defendants pray the judgment of this Honorable Court whether they will be compelled to appear herein, or answer hereto, because of the many defects in said pretended service,
78 by reason of which no legal service has been had upon the said defendants nor have said defendants accepted service herein, nor have they waived due service of process upon them, nor have they voluntarily appeared herein.

KAY & DOGGETT,
Attorneys and Solicitors,
Appearing Specially, Solely, and Only for the Purpose of This Motion and Limiting the Same to Said Purpose.

Exhibit A.

Special Appearance to Quash Pretended Service by Publication on Rome Insurance Company, American Bank & Trust Company, Trustee, and First National Bank of Rome, Georgia.

In the Circuit Court of Florida, Third Judicial Circuit, in and for Hamilton County, Florida.

In Chancery.

C. L. ADAMS, Complainant,

vs.

ROME INSURANCE COMPANY et al., Defendants.

Come now defendants, Rome Insurance Company; American Bank and Trust Company, Trustee; and First National Bank of Rome, Georgia, by Kay and Doggett, their Solicitors and Counsel, and not appearing generally, but appearing specially, solely and only, and limiting this appearance to what, in contemplation of law, amounts only and solely to a special appearance for the purpose of quashing the attempted and pretended service herein, to that end do hereby move to quash said service and to vacate and hold said pretended and attempted service by publication upon these defendants to be for naught, upon the following grounds, to-wit:

79 1st. Because, on account of the attempted and pretended service by publication, the Court does not acquire jurisdiction of said defendants.

2nd. Because said service is defective and not such as is required by law, in that the defendants are foreign corporation-, not resident in Florida, and have not received personal service of process herein in the State of Florida.

3rd. Because this is an action in personam, and said defendants have not received personal service of process herein in the State of Florida.

4th Because as appears upon the face of the record in this cause legal service of process has not been had upon the said defendants. And these defendants pray the judgment of this Honorable Court whether they will be compelled to appear herein, or answer hereto, because of the defects in said pretended service, by reason of which no legal service has been had upon the said defendants, now [nor] have said defendants accepted service herein, nor have they voluntarily appeared herein, nor have they waived due service of process upon them.

KAY & DOGGETT.

Attorneys and Solicitors, Appearing Specially, Solely, and Only for the Purpose of This Motion and Limiting the Same to Said Purpose.

"Exhibit B."

80 *Stipulation of Counsel.*

In the Circuit Court, Third Judicial Circuit, in and for Hamilton County, Fla.

In Chancery.

C. L. ADAMS

vs.

ROME INSURANCE COMPANY et al.

It is hereby stipulated and agreed by and between S. S. Sanford and Carter & McCollum, Solicitors for the complainant herein, and Kay & Doggett, who have not appeared generally, but who have appeared only specially as Solicitors for the defendants herein, Rome Insurance Company, American Bank & Trust Company and First National Bank of Rome, Georgia, and who are making this agreement specially, solely for the purpose herein expressed:

That proceedings in this cause be stayed pending the prosecution of an appeal from the orders of the Court overruling the motions of the said defendants to quash service in the case of B. F. Carter vs. Rome Insurance Company, et al., which said case is now on file and being prosecuted in this Court;

That the ultimated decision of the said appeal in the said case of B. F. Carter vs. Rome Insurance Company shall be decisive of the validity of the service by publication on the said defendants in this case, and if the service in the said Carter case be ultimately held defective, and ordered quashed, then the service in this case, the validity of which involves identically the same legal questions as that in the Carter case, shall be held defective and shall be quashed; and

That this stipulation of Counsel shall not be considered as constituting a general appearance of the said defendants in this cause:

81 This agreement being signed and entered into this 10th day of April A. D. 1913

_____,

_____,

Solicitors for Complainants.

_____,

Solicitors for Defendants Rome Insurance Co., American Bank & Trust Co., and First National Bank of Rome, Ga., Who Have Appeared Only Specially in said Cause.

"Exhibit C."

82 TRANSCRIPT OF RECORD OF PROCEEDINGS IN THE CIRCUIT COURT OF HAMILTON COUNTY, FLORIDA, IN THE SUIT OF B. F. CARTER, COMPLAINANT, VS. ROME INSURANCE COMPANY ET AL., DEFENDANTS, THEREIN LATELY PENDING.

* * * * * * *

On the 3rd day of January, 1913, the Complainant filed his original bill, in words and figures following:

Bill of Complaint.

In the Circuit Court of the Third Judicial Circuit of Florida in and for Hamilton County.

In Chancery.

B. F. CARTER, Complainant,

vs.

ROME INSURANCE COMPANY et al., Defendants.

Bill for Relief.

To Hon. Mallory F. Horne, Judge of the Circuit Court of the Third Judicial Circuit of Florida in and for Hamilton County, in Chancery sitting:

Your orator B. F. Carter, a citizen and resident of Hamilton County, Florida, by his undersigned solicitors, brings this his bill of complaint against Rome Insurance Company, a corporation, organized under the laws of Georgia, of Rome, in Floyd County, Georgia; American Bank & Trust Company, a corporation organized under the laws of Georgia, of Rome, in said Floyd County, Georgia; First National Bank of Rome, a corporation organized under the laws of United States of Rome, in said Floyd County, Georgia; Bank
83 of Jasper, a corporation organized under the laws of Florida, of Jasper, in Hamilton County, Florida, defendants, and thereupon your orator would respectfully show unto your Honor, as follows:

1. That on, to-wit, about the 25 day of Nov. 1911, the defendant Rome Insurance Company was a foreign corporation organized and existing under and by virtue of the laws of the State of Georgia, with its principal place of business at the City of Rome, in said state, and was then and there engaged in the Insurance business, and the defendant, American Bank and Trust Company was on the date aforesaid, likewise a corporation organized and existing under and by virtue of the laws of the State of Georgia, with its place of business at Rome, in said State of Georgia, and was engaged in the banking

business and acting as trustee for those persons and corporations desiring its services as trustee.

2. That on, to-wit, about the 25th day of Nov. 1911, the said defendant, Rome Insurance Company, was desirous of offering for sale and selling shares of the capital stock, and in order to effectuate its desire and purpose in that respect, it caused to be named as its trustee for such purpose, its co-defendant, the said American Bank and Trust Company of Rome, Georgia, and authorized the said Trustee to offer for sale and sell to persons desiring the same, shares of the capital stock of the Rome Insurance Company, and which said shares were to be fully paid and non-assessible and of the par value of Ten dollars ($10.00) per share, but to be sold by the said trustee at the sum of Thirty dollars ($30.00) per share, or on the ratio of Three Dollars ($3.00) to be paid for each one dollar ($1.00) par value of stock; and the said Rome Insurance Company and the American Bank and Trust Company in order to effectuate the sale of the capital stock of the said Rome Insurance Company, sent their agent or representative into Hamilton County, Florida, where your orator
84 resides and still resides, and there solicited your orator to purchase through the said trustee, certificates of shares in the capital stock of the said Rome Insurance Company.

3. And your orator further alleges that the said Rome Insurance Company and the American Bank and Trust Company, of Rome, Georgia, by and through their said agent or representative, then and there, to-wit, about the 25 day of Nov. 1911, and in Hamilton County, Florida, approached your orator and opened up negotiations with him for the purpose of inducing your orator to purchase shares of said capital stock of the Rome Insurance Company and then and there falsely and fraudulently and with the intent and purpose to deceive and defraud your orator, represented to your orator that the shares of the capital stock in the said Rome Insurance Company so offered for sale by the said Rome Insurance Company and the American Bank and Trust Company, as trustee, was of great value, to-wit of the value of Three dollars ($3.00) for each one dollar ($1.00), of said capital stock; that your orator was then and there wholly ignorant and uninformed as to the value of said stock, of which ignorance and lack of information the said Rome Insurance Company and American Bank and Trust Company, trustee, knew or ought to have known, and your orator was wholly dependent upon said Insurance Company and its trustee for information with respect to said capital stock, and he believed and relied upon the statements and representations so made to him, as aforesaid, with respect to the value of said capital stock; that the said Insurance Company and its said trustee, further falsely and fraudulently and with the intention and purpose to deceive and defraud your orator, then and there represented to him that the said Rome Insurance Company was a solvent corporation and possessed of assets in value far in excess of its liabilities, and your orator relied upon and placed confidence in said fals

representations; and your orator charges that all of the said
85 representations aforesaid, so made to him by the said Insurance Company and its trustee, were then and there wholly false and untrue, and the said Insurance Company and its said trustee well knew the same to be false and untrue, and intended by said false and fraudulent representations to deceive and defraud your orator, and did deceive and defraud him, and by means thereof your orator was induced to purchase and agree to pay for and did purchase and agree to pay for, in reliance upon such false and fraudulent representations 10 shares of the capital stock of said Rome Insurance Company, on the basis of Three dollars ($3.00) to be paid for each One dollar ($1.00) face value of said capital stock, and amounting in the aggregate to the sum of 300 dollars so agreed to be paid for by your orator for such capital stock. And your orator further alleges that certificates of shares in capital stock of the said Rome Insurance Company were issued to your orator and your orator alleges that said capital stock so sold to him was then and there wholly without value and was not then and there worth Three dollars ($3.00) or any other sum, for each One dollar ($1.00) of the face value thereof, and the said Rome Insurance Company was at that time hopelessly involved and embarrassed financially and was then wholly insolvent, although your orator was not at that time aware of the worthlessness of the capital stock of the Rome Insurance Company, or aware of its insolvency; that both the said Rome Insurance Company and its said trustee, then knew or ought to have known that the capital stock of said Insurance Company was worthless and the said Company practically insolvent.

4. And your orator further alleges that by an agreement entered into between your orator and American Bank and Trust Company as trustee, for the said Rome Insurance Company, and its co-defendant, the said Bank of Jasper, it was then and there to-wit, about the 25 day of Nov. 1911, and in Hamilton County, Florida, agreed that your orator as consideration to be paid for *said* shares of the capital
stock of the Rome Insurance Company should execute a note
86 payable to orator's order, for the sum of $300 *dollars*, and deposit the same in the said Bank of Jasper; which said bank was to discount said note and issue a certificate of deposit for the proceeds thereof, and said certificate of deposit to be turned over to the American Bank and Trust Company, of Rome, Georgia, as such trustee, and payable at future date; that in pursuance of the said tripartite agreement, your orator executed said note and the American Bank and Trust Company procured a certificate of deposit to be issued for the purpose thereof, and which proceeds were included in certificate No. 319 of said bank, dated at Jasper, Florida, on the 25 day of Nov. 1911, and wherein it was certified by W. S. Murrow, as Cashier of the said Bank of Josper, that said American Bank and Trust Company of Rome, as trustee, had deposited in said bank $1,558.20 *dollars* payable to the order of itself on return of said certificate properly indorsed, with interest at four per cent per annum, compounded quarterly, and said certificate payable on or after November 25, 1912; that said certificate was delivered by said Bank of

Jasper, to the agent of Rome Insurance Company and American Bank and Trust Company. Your orator further alleges that the negotiations and agreement made with him for the purchase of said shares in the capital stock in the Rome Insurance Company, and the method by which the same should be paid for, including the execution of said note by your orator and the issuance of a certificate of deposit by the said Bank of Jasper, were all discussed and agreed upon by your orator, American Bank and Trust Company, as trustee, as aforesaid, and the said Bank of Jasper, Florida, in advance of and at the time of said purchase and the same were contemporaneous and formed but one act and agreement.

5. And your orator would further allege that the note executed by him and refer-ed to in the proceding paragraph is now in the hands of the said Bank of Jasper, Florida, and the certificate of de-
87 posit is in the hands of said defendant, First National Bank of Rome, by virtue of a pretended assignment or transfer thereof claimed to have been made by said American Bank and Trust Company, yet the said note is outstanding in the hands of the said Bank and the bank has refused to deliver up the same to your orator for cancellation; that by reason of the false and fraudulent representation so made to your orator by the Rome Insurance Company and The American Bank and Trust Company, Trustee, through their agent and representative, mention whereof is made in the third paragraph of this bill, the purchase of said shares of stock in the said Rome Insurance Company by your orator and the agreement therefor, *in* and ought to be decreed of no force and effect, as having been procured by the fraud, deceit, covin and guile of the said Insurance Company, and its trustee, American Bank and Trust Company, and the note of your orator now held by the said Bank of Jasper, is and ought to be decreed to be wholly void, and of no effect, and the same should be delivered up to your orator.

6. And your orator would further allege that the pretended contract for the sale and purchase of said shares of stock in the said Rome Insurance Company, with your orator, made by or on behalf of the said Rome Insurance Company, and the said American Bank and Trust Company is and ought to be decreed to be void because your orator alleges the truth to be that the said Rome Insurance Company and the said American Bank and Trust Company, were and each of them was at the time — making the aforesaid contract with your orator and the execution of said note and the certificate of deposit, a foreign corporation and organized by and under the laws of the State of Georgia, and by virtue of Section 1, of Chapter 5717 of the laws of Florida, neither of said Corporations were authorized to transact business or to acquire, hold or dispose of property in the State of Florida until it shall have filed in the office of the
88 Secretary of State, a duly authenticated copy of its charter or articles of incorporation, and shall have received from said Secretary of State a permit to transact business in Florida; and your orator alleges that at the time of the making of the pretended con-

tract of sale and purchase of shares of the capital stock of the said Rome Insurance Company by your orator as hereinbefore alleged, and at the time of the execution of said note and the issuance of said certificate of deposit neither the said Rome Insurance Company or the said American Bank and Trust Company, had filed in the office of the Secretary of State a duly authenticated copy of its charter articles of incorporation nor had they or either of them received from the Secretary a permit to transact business in this State.

7. And your orator further alleges that he is ready, willing and able and hereby offers to surrender to the said Rome Insurance Company, or its trustee, the American Bank and Trust Company, the certificate of shares of stock issued to him and stands ready and offers to comply with such order and decree of your Honor with respect to the surrender of said certificate as may be entered in this suit.

In as much as your orator is without adequate remedy except in equity, he prays as follows:

(*a*) That your Honor take jurisdiction of the parties and subject matter of this bill, and grant to your orator the relief hereinafter prayed.

(*b*) That the certificate of deposit, in so far as the same covers and includes the proceeds derived from the note executed by your orator, as hereinbefore alleged, and which certificate was issued by the Bank of Jasper, Florida, to the American Bank and Trust Company of Rome, Georgia, as Trustee, dated 25 day of Nov. 1911, and for the total sum of $1,558.20 *dollars*, to be decreed to be void and

89 (*c*) That the note executed by your orator payable to his order for the sum of 300 dollars, dated 25 day of Nov. 1911, and delivered to the Bank of Jasper, Florida, be decreed to be void and of no effect, and the said bank be required to cancel and surrender the same to your orator.

(*d*) That the pretended contract of agreement made by your orator with the said Rome Insurance Company and the American Bank and Trust Company, its Trustee, providing for the said sale and purchase of 10 shares of the capital stock of the said Rome Insurance Company be decreed to be wholly void and of no effect.

(*e*) That the American Bank and Trust Company, Trustee, as aforesaid, and the Rome Insurance Company, and each of them, be enjoined and restrained by order of this Court from instituting any suit against your orator on account of the said pretended contract of sale, and purchase of shares of stock in the Rome Insurance Company.

(*f*) That the Bank of Jasper, Florida, be restrained by order of this Court from instituting any suit or action to cover on account of the said note executed by your orator, dated 25 day of Nov. 1911, and now held by the said Bank of Jasper, Florida.

(*g*) That the said injunction hereinbefore prayed for be made preliminarily and temporary until the further order of the Court and upon final hearing that the same may be made perpetual.

(*h*) That your orator have such other, further and general relief in the premises as the equities of his case may require and to your Honor may seem meet and proper.

And may it please your Honor to grant unto your orator the State's writ of subpœna in Chancery, issuing out of and under
90 the seal of this Court, and directed to the said defendants Rome Insurance Company, a corporation under the laws of Georgia; American Bank and Trust Company, a corporation under the laws of Georgia; First National Bank of Rome, Georgia, a corporation under the laws of the U. S. and the Bank of Jasper, a corporation under the laws of Florida, directing and commanding them and each of them to be and appear before this honorable Court at a time and place to be therein designated and under a certain penalty to be therein stipulated, then and there true, perfect and complete answer make (but not under oath, the oath to said answers being hereby specifically waived) to all and singular the allegations in the bill contained, and to stand to abide by and perform the orders and decree of your Honor in the premises.

And your orator will ever pray, etc.

CARTER & McCOLLUM.

STATE OF FLORIDA,
County ——, *ss:*

Before me personally appeared —— ——, who being duly sworn deposed and says that affiant is the complainant in the above entitled cause and has read the foregoing bill and knows the contents thereof and that the same is true.

B. F. CARTER.

Sworn to and subscribed before me this 3 day of Jan., A. D. 1913.
[SEAL.] J. B. WETHERINGTON,
C. C. C.

91 On the 3rd day of January, 1913, complainant filed an affidavit in said case, in words and figures as follows:

In Circuit Court, Hamilton County, Florida.

In Chancery.

B. F. CARTER, Complainant,

vs.

ROME INSURANCE COMPANY et al., Defendants.

Bill for Relief.

STATE OF FLORIDA,
Hamilton County:

Before me personally appeared B. F. Carter, who being duly sworn, on oath says; that affiant is the complainant in the above entitled cause; that the defendant Rome Insurance Company is a corporation organized and existing under and by virtue of the laws of Georgia, with its principal office and place of business in the City of Rome, in Floyd County, State of Georgia; and the defendant American Bank & Trust Company is a corporation organized and existing under and by virtue of the laws of Georgia, with its principal office and place of business in the City of Rome, in County of Floyd, State of Georgia; and the defendant First National Bank of Rome, Georgia, is a corporation organized and existing under and by virtue of the laws of the United States with its principal office and place of business in the City of Rome, in Floyd County, State of Georgia; that neither of said corporations is a resident of or domiciled in the State of Florida; that there is no person in the State of Florida, the service of a subpoena upon whom would bind such defendants, or either of them.

B. F. CARTER.

Sworn to and subscribed before me this 3 day of Jan. A. D. 1913.
[SEAL.] J. B. WETHERINGTON,
Clerk Ct. Ct.

92 On the the 3rd day of January, 1913, the Clerk of the Court issued an order of publication, directed to defendants, — was as follows:

To Rome Insurance Co., a corporation under the laws of Georgia; American Bank & Trust Co., a corporation under the laws of Georgia, trustee, of Rome, Ga., and to the First National Bank of Rome, Ga., a corporation under the laws of the United States:

It appearing from affidavit accompanying Bill of Complaint filed against you by B. F. Carter, in the Circuit Court of Hamilton County, Florida, in Chancery, on the 3rd day of January, 1913, that you and each of you, are non-residents of the State of Florida, and are residents of Rome, Georgia, it is hereby ordered that you

and each of you do appear to the bill of complaint on the 21st day of February, A. D. 1913, at the Clerk's office of said Circuit Court in Jasper, Florida.

It is further ordered that this notice be published in the Jasper News, a weekly newspaper published in Jasper, Hamilton County, Florida, once each week for four successive weeks.

Done and ordered this 3rd day of January, A. D. 1913.

[SEAL.] J. B. WETHERINGTON,
Clerk Circuit Court.

93 On the 20th day of February, 1913, the defendants filed special appearance and motion to quash service by publication, which was as follows:

Special Appearance to Quash Pretended Service by Publication of Rome Insurance Company, American Bank and Trust Company, Trustee, and First National Bank of Rome, Georgia.

In the Circuit Court of Florida, Third Judicial Circuit, in and for Hamilton County, Florida.

In Chancery.

B. F. CARTER, Complainant.

vs.

ROME INSURANCE COMPANY et al., Defendants.

Come now defendants, Rome Insurance Company, American Bank and Trust Company, Truster, and First National Bank of Rome, Georgia, by Kay and Doggett, their solicitors and Counsel, and not appearing generally but appearing specially, solely, and only, and limiting this appearance to what, in contemplation of law, amounts only and solely to a special appearance for the purpose of quashing the attempted and pretended service herein, to that end do hereby move to quash said service upon the following grounds, to wit:

1st. Because on account of the attempted and pretended service by publication, the Court does not acquire jurisdiction of said defendants.

2nd. Because said service is defective and not such as is required by law, in that the defendants are foreign corporations, not resident in Florida, and have not received personal service of process herein in the State of Florida, and to vacate and hold said pretended and attempted service by publication upon these defendants to be for naught; and these defendants pray the judgment of this

94 Honorable Court whether they will be compelled to appear herein or answer hereto, because of the many defects in said pretended service by reason of which no legal service has been had

upon the said defendants, nor have said defendants accepted service herein, nor have they voluntarily appeared herein, nor have they waived due service of process upon them.

KAY & DOGGETT,
Attorneys and Solicitors, Appearing Specially, Solely, and Only for the Purpose of this Motion and Limiting the same to said Purposes.

On the 25th day of February, 1913, the Foreman of The Jasper News, the newspaper in which notice of publication was made, filed an affidavit setting up proof of publication thereof.

On the 25th day of February, 1913, the Clerk of the Circuit Court made and filed a certificate setting up therein that order of publication directed to defendants was made, published, posted and mailed, in accordance with law.

On the 14th day of March, 1913, the Court made an order allowing the complainant to file an amended bill, and overruling the motion of defendants under original bill to quash service had upon them by publication, which said order is in words and figures, as follows:

In Circuit Court, Third Judicial Circuit, of the State of Florida in and for Hamilton County.

B. F. CARTER

vs.

ROME INSURANCE COMPANY, AMERICAN BANK & TRUST COMPANY, Trustee; THE BANK OF JASPER.

Bill for Relief.

This cause came on to be heard upon motion of defendants, Rome Insurance Company, American Bank & Trust Company, Trustee, to quash and set aside service by publication, in so far as same relates to said defendant, upon notice, and pending the argument of counsel, upon such motion, the complainant made his motion to be allowed to file an amended bill, and upon consideration, it is ordered and decreed by the Court:

1. That complainant's said motion to be allowed to file an amended bill of complaint is hereby granted, and the complainant is hereby allowed ten days in which to file such amended bill.

2. That said defendants' said motion to quash and set aside the service by publication as the same appears of record in this proceeding be, and the same is hereby overruled and the defendants are allowed thirty days from this date in which to further plead, proceed, answer *of* [or] demur.

This March 14th, A. D. 1913. M. F. HORNE,
Judge Circuit Court, Hamilton Co., Fla.

Duly recorded in Circuit Court, Minute Docket No. 11, page 117 this March 14th, A. D. 1913.

M. P. HUNTER,
Clerk.

[SEAL.]

By G. S. FRINK,
D. C.

96 On the 24th day of March, 1913, complainant filed his amended bill, which is in words and figures as follows:

Amended Bill of Complaint.

In the Circuit Court of the Third Judicial Circuit of Florida in and for Hamilton County.

In Chancery.

B. F. CARTER, Complainant,

vs.

ROME INSURANCE COMPANY et al., Defendants.

Bill of Relief.

To Hon. Mallory F. Horne, judge of the Circuit Court of the Third Judicial Circuit of Florida in and for Hamilton County, in chancery sitting:

Your orator, B. F. Carter, a citizen and resident of Hamilton County, Florida by his undersigned solicitors, by leave of the Court first had and obtained, brings this his bill of complaint against Rome Insurance Company, and American Bank and Trust Company, both corporations organized under the laws of Georgia, and both at Rome, Georgia, First National Bank of Rome, as corporation under the laws of United States, of Rome, Georgia, and the Bank of Jasper, a corporation under the laws of Florida, of Jasper, Florida, defendants, and thereupon your orator would respectifully show unto your Honor, as follows:

1. That on, to-wit, about the 25 day of Nov. 1911, the defendant Rome Insurance Company was a foreign corporation organized and existing under and by virtue of the laws of the State of Georgia, with its principal place of business at the City of Rome, in said State, and was then and there engaged in the Insurance business, and the defendant, American Bank and Trust Company was on the
97 date aforesaid, likewise a corporation organized and existing under and by virtue of the laws of the State of Georgia, with its place of business at Rome, in said State of Georgia, and was engaged in the banking business and acting as trustee for those persons and corporations desiring its service as trustee.

2. That on, to-wit, about the 25 day of Nov. 1911, the said defendant Rome Insurance Company was desirous of offering for sale and selling shares of the capital stock, and in order to effectuate its desire and purpose in that respect it caused to be named as its trustee for such purpose, its co-defendant, the said American Bank and Trust Company, of Rome, Georgia, and authorized the said trustee to offer for sale and sell to persons desiring the same, shares of the capital stock of the said Rome Insurance Company, and which said shares were to be fully paid and non-assessible, and of the par value of ten dollars ($10.00) per share, but to be sold by the said trustee at the sum of thirty dollars ($30.00) per share, or on the ratio of Three Dollars ($3.00) to be paid for each One Dollar ($1.00) par value of stock; and the said Rome Insurance Company and the American Bank and Trust Company in order to effectuate the sale of the capital stock of said Rome Insurance Company, sent their agent or representative into Hamilton County, Florida, where your orator resided and still resides, and certificates of shares in the capital stock of the said Rome Insurance Company.

3. And your orator further alleges that the said Rome Insurance Company and the American Bank and Trust Company of Rome, Georgia, by and through their said agent or representative then and there, to-wit, about the 25 day of Nov., 1911, and in Hamilton County, Florida, approached your orator and opened up negotiations with him for the purpose of inducing your orator to purchase shares of the capital stock of the Rome Insurance Company, and
98 then and there falsely and fraudulently and with the intent and purpose to deceive and defraud your orator, represented to your orator, that the shares of the capital stock in the said Rome Insurance Company so offered for sale by the said Rome Insurance Company and the American Bank and Trust Company, as Trustee, was of great value, to-wit: of the value of Three Dollars ($3.00) for each One Dollar ($1.00) of said capital stock, that your orator was then and there wholly ignorant and uninformed as to the value of said stock, of which ignorance and lack of information the said Rome Insurance Company and American Bank and Trust Company, trustee, knew or ought to have known, and your orator was wholly dependent upon said Insurance Company and its trustee for information with respect to said capital stock, and he believed and relied upon the statements and representations so made to him, as aforesaid, with respect to the value of said stock; that the said Insurance Company, and its said trustee, further falsely and fraudulently and with the intention and purpose to deceive and defraud your orator, then and there represented to him that the said Rome Insurance Company was a solvent corporation and possessed of assets in value far in excess of its liabilities, and your orator relied upon and placed confidence in said false representations; and your orator charges that all of said representations aforesaid, so made to him by the said Insurance Company and its trustee, were then and there wholly false and untrue, and the said Insurance Company and its said trustee well knew the same to be false and untrue, and intended

by said false and fraudulent representations to deceive and defraud your ora-or, and did deceive and defraud him, and by means thereof your orator was induced to purchase and agree to pay for and did purchase and agree to pay for, in reliance upon such false and fraudulent representations 10 shares of the capital stock of said Rome Insurance Company, on the basis of Three Dollars ($3.00)
99 to be paid for each One Dollar (1.00) face value of said capital stock and amounting in the aggregate to the sum of 300 dollars so agreed to be paid for by your orator for such capital stock. And your orator further alleges that certificates of shares in capital stock of the said Rome Insurance Company were issued to your orator, and your orator alleges that said capital stock so sold to him was then and there wholly without value and was not then and there worth Three Dollars ($3.00) or any other sum, for each one dollar (1.00) of the face value thereof, and the said Rome Insurance Company was at that time hopelessly involved and embarassed financially and was then wholly insolvent, although your orator was not at that time aware of the worthlessness of the capital stock of the Rome Insurance Company, or aware of its insolvency; that both the said Rome Insurance Company and its said trustee, then knew, or ought to have known that the capital stock of said Insurance Company was worthless and the said company practically insolvent.

4. And your orator further alleges that by an agreement entered into between your orator and American Bank and Trust Company, as trustee, for the said Rome Insurance Company and its co-defendant, the said Bank of Jasper, it was then and there to-wit: about the 25 day of Nov., 1911, and in Hamilton County, Florida, agreed that your orator as consideration to be paid for said shares of the capital stock of the Rome Insurance Company, should execute a note payable to orator's order, for the sum of 300 dollars, and deposit the same in the said Bank of Jasper, which said Bank was to discount said note and issue a certificate of deposit for the proceeds thereof, and said certificate of deposit to be turned over to the American Bank and Trust Company of Rome, Georgia, as such trustee, and payable at future date; that in pursuance of the said tri-partite agreement, your orator executed said note and the American Bank and Trust Com-
100 pany and your orator procured a certificate of deposit to be issued for the proceeds thereof, and which proceeds were included in certificate No. 319 of said bank, dated at Jasper, Florida, on the 25 day of November, 1911, and wherein it was certified by W. S. Murrow as Cashier of the said Bank of Jasper, that said American Bank and Trust Company, as trustee, had deposited in said bank $1,558.20 *dollars*, payable to the order of itself on return of said certificate properly indorsed, with interest at four percent per annum, compounded quarterly, and said certificate payable on or after November 25, 1912; that said certificate was delivered by said Bank of Jasper to the agent of Rome Insurance Company and American Bank and Trust Company. Your orator further alleges that the negotiations and agreement with him for the purchase of said shares in the capital stock in the Rome Insurance Company, and the method

by which the same should be paid for, including the execution of said note by your orator and the issuance of a certificate of deposit by the said Bank of Jasper, were all discussed and agreed upon by your orator, American Bank and Trust Company, as trustee, aforesaid, and the said Bank of Jasper, Florida, in advance of and at the time of said purchase, and the same were contemporaneous and formed but one act and agreement.

5. And your orator would further allege that the note executed by him and referred to in the preceding paragraph is now in the hands of the said Bank of Jasper, Florida, and the certificate of deposit is in the hands of First National Bank of Rome, by virtue of a pretended assignment and transfer thereof, yet the said note is outstanding in the hands of the said bank, and the bank has refused to deliver the same to your orator for cancellation; and your orator alleges that the proceeds of said note, to-wit, the sum of $..... is now in the custody of the said Bank of Jasper, in its banking house at Jasper,
101 Hamilton County, Florida, and has so remained in the custody of said bank since it was deposited therein, and the defendant First National Bank of Rome has demanded and is now demanding of said bank that it pay over the same to the said defendant, and has claimed and is now claiming and asserting the right thereto, and has claimed and is now claiming that the said proceeds so deposited aforesaid, belongs to said defendant, and orator fears and believes that if said proceeds are paid over to said defendant, they will be removed beyond the jurisdiction of said Court and out of the State of Florida; that by reason of the false and fraudulent representations so made to your orator by the Rome Insurance Company, and the American Bank and Trust Company, trustee, through their agent and representative, mention whereof is made in the third paragraph of this bill, the purchase of said shares of stock in the said Rome Insurance Company by your orator and the agreement therefor, is and ought to be decreed of no force and effect as having been procured by the fraud, deceit, covin and guile of the said Insurance Company and its trustee, American Bank and Trust Company, and the note of your orator now held by the said Bank of Jasper, is and ought to be decreed to be wholly void and of no effect, and the same should be delivered up to your orator, and your orator further alleges that under the circumstances disclosed by the allegations of this bill, the proceeds of said note in the hands of the said Bank of Jasper, defendant, as aforesaid, should be decreed not to belong to the holder of said certificate of deposit, on account of the said deposit having been induced and procured to be made by the false and fraudulent representations of the said Rome Insurance Company, and American Bank and Trust Company as herein set forth and alleged, and in the event that the note executed by your orator and now in the hands of the said Bank of Jasper, defendant, should not be held void, under Chapter 5717 of the laws of Florida, then
102 the funds now in the hands of the defendant, Bank of Jasper, as the proceeds of said note, should be decreed to be impressed with a trust in favor of your orator and to belong to him.

6. And your orator would further allege that the pretended contract for the sale and purchase of the said shares of stock in the said Rome Insurance Company, with your orator, made by or on behalf of the said Rome Insurance Company and the said American Bank and Trust Company is and ought to be decreed to be void, because your orator alleges the truth to be that the said Rome Insurance Company and the said American Bank and Trust Company were and each of them was, at the time of making the aforesaid contract with your orator and the execution of said note and the certificate of deposit, a foreign corporation and organized by and under the laws of the State of Georgia, and by virtue of Section 1, of chapter 5717 of the laws of Florida, neither of said corporations were authorized to transact business or to acquire hold or dispose of property in the State of Florida, until it shall have filed in the office of the Secretary of State, a duly authenticated copy of its charter or articles of incorporation, and shall have received from said Secretary of State a permit to transact business in Florida, and your orator alleges that at the time of the making of the pretended contract of sale and purchase of shares of the capital stock of the said Rome Insurance Company by your orator as hereinbefore alleged, and at the time of the execution of said note and the issuance of said certificate of deposit; neither the said Rome Insurance Company, or the said American Bank and Trust Company, had filed in the office of the Secretary of State a duly authenticated copy of its charter or articles of incorporation nor had they or either of them received from the Secretary of State a permit to transact business in this State.

7. And your orator alleges that he is ready, willing and able
103 and hereby offers to surrender to the said Rome Insurance Company, or its trustee, the American Bank and Trust Company, the certificates of shares of stock issued to him and stands ready and offers to comply with such order and decree of your Honor with respect to the surrender of said certificates as may be entered in this suit.

Inasmuch as your orator is without adequate remedy except in equity, he prays as follows:

(*a*) That your Honor take jurisdiction of the parties and subject matter of this bill, and grant to your orator the relief hereinafter prayed.

(*b*) That the certificate of deposit, insofar as the same covers and includes the proceeds derived from the note executed by your orator, as hereinbefore alleged, and which certificate was issued by the Bank of Jasper, Florida, to the American Bank and Trust Company of Rome, Georgia, as Trustee, dated 25 day of November, 1911, and for the total sum of $1,558.20 dollars be decreed to be void, and,

(*c*) That the note executed by your orator payable to his order for the sum of 300 dollars, dated 25 day of Nov., 1911, and delivered to the Bank of Jasper, Florida, be decreed to be void, and of no

effect, and the said bank be required to cancel and surrender the same to your orator.

(*d*) That the pretended contract of agreement made by your orator with the said Rome Insurance Company and the American Bank and Trust Company, its trustee, providing for the sale and purchase of 10 shares of the capital stock of the said Rome Insurance Company, be decreed to be wholly void, and of no effect.

(*e*) That the American Bank and Trust Company, Trustee, as aforesaid and the Rome Insurance Company, and each of
104 them, be enjoined and restrained by order of this Court from instituting any suit against your orator on account of the said pretended contract of sale and purchase of shares of stock in the Rome Insurance Company.

(*f*) That the Bank of Jasper, Florida, be restrained by order of this Court from instituting any suit or action to recover on account of the said note executed by your orator, dated 25 day of Nov., 1911, and now held by the said Bank of Jasper, Florida.

(*g*) That the said Bank of Jasper, defendant, be restrained and enjoined from paying out of the proceeds of the note executed by your orator dated 25 day of Nov., 1911, to the defendant, First National Bank of Rome, or anyone for it, and that the defendant, First National Bank of Rome, be restrained and enjoined from withdrawing the said proceeds or any part thereof from the said Bank of Jasper and that said First National Bank of Rome be decreed not to have any right or interest in said proceeds or any part thereof.

(*h*) That in the event the note so executed by your orator shall be held to have been void by virtue of Chapter 5717 of the laws of Florida then that the proceeds arising therefrom be decreed to be impressed with a trust in favor of your orator and to belong to him and the Bank of Jasper be required to pay the same over to your orator.

(*i*) That the said injunction hereinbefore prayed for be made preliminarily and temporary until the further order of the Court and upon final hearing that the same may be made perpetual.

(*j*) That your orator have such other, further and general relief in the premises as the equities of his case may require and to your Honor may seem meet and proper.

105 And may it please your Honor to grant unto your orator the State's writ of subpœna in Chancery, issuing out of and under the seal of this Court, and directed to the said defendants, Rome Insurance Company, a corporation of Rome, Georgia; American Bank and Trust Company, a corporation of Rome, Georgia; First National Bank of Rome, a corporation of Rome, Georgia, and the Bank of Jasper, a corporation of Jasper, Florida, directing and commanding them and each of them to be and appear before this

Honorable Court at a time and place to be therein designated and under a certain penalty to be herein stipulated, then and there true, perfect and complete answer make (but not under oath, the oath to said answers being hereby specifically waived) to all and singular the allegations in this bill contained, and to stand to abide by and perform the orders and decree of your Honor in the premises.

S. S. SANDFORD,
CARTER & McCOLLUM,
Of Counsel & Sols. for Complt.

STATE OF FLORIDA.
County of ——, *ss:*

Before me personally appeared B. F. Carter, who being *fully* sworn, deposes and says that affiant is the complainant in the above entitled cause and has read the foregoing bill and knows the contents thereof, and that the same is true.

B. F. CARTER.

Sworn to and subscribed before me this 24th day of March, A. D. 1913.

[SEAL.]

M. P. HUNTER,
Clerk of Circuit Court.

106 On the 3rd day of April, 1913, defendants filed special appearance and motion to quash service under amended bill, which in words and figures is as follows:

Special Appearance to Quash Pretended Service by Publication on Rome Insurance Company, American Bank & Trust Company, Trustee, and First National Bank of Rome, Georgia.

In the Circuit Court of Florida, Third Judicial Circuit, in and for Hamilton County, Florida.

In Chancery.

B. F. CARTER, Complainant,

vs.

ROME INSURANCE COMPANY et al., Defendants.

Comes now defendants, Rome Insurance Company, American Bank and Trust Company, Trustee, and First National Bank of Rome, Georgia, by Kay & Doggett, their Solicitors and Counsel, and not appearing generally, but appearing specially, solely and only, and limiting this appearance to what in contemplation of law, amounts only and solely to a special appearance for the purpose of quashing the attempted and pretended service herein, to that end do hereby move to quash said service, and to vacate and hold said pretended and attempted service, by publication upon these defendants to be for naught, upon the following grounds, to wit:

1st. Because on account of the attempted and pretended service by publication, the Court does not acquire jurisdiction of said defendants.

2nd. Because said service is defective and not such as it required by law, in that the defendants are foreign corporations, not resident in Florida, and have not received personal service of process herein in the State of Florida.

107 3rd. Because this is an action in personam, and said defendants have not received personal service of process herein in the State of Florida.

4th. Because as appears upon the face of the record, in this cause, legal service of process has not been had upon the said defendants.

And these defendants pray the judgment of this Honorable Court whether they will be compelled to appear herein, or answer hereto, because of the many defects in said pretended service, by reason of which no legal service has been had upon the said defendants nor have said defendants accepted service herein, nor have they voluntarily appeared herein, nor have they waived due service of process upon them.

KAY & DOGGETT,
Attorneys and Solicitors,
Appearing Specially, Solely, and Only for the Purpose of This Motion, and Limiting the Same to said Purposes.

On the 5th day of April, 1913, the Court made an order overruling motion of defendants, under the amended bill, to quash the service, which order is as follows:

Motion to Quash.

In Circuit Court in and for Hamilton County, Florida, in Chancery Sitting.

B. F. CARTER

vs.

ROME INSURANCE COMPANY et al.

This cause came on to be heard on this day upon motion of defendants herein to quash service and was argued by counsel for complainants and defendants, and the Court being advised in the prem-
108 ises, it is upon consideration, ordered and adjudged that said motion to quash service be and same is hereby overruled, and defendants allowed thirty days from this date in which to plead, answer or demur as they may be advised, and complainants allowed ten days thereafter in which to reply as he may be advised.

Done, ordered in vacation at Jasper, Florida, this 3rd day of April, A. D. 1913.

M. F. HORNE,
Judge.

Duly recorded in Circuit Court Minute Docket No. 11, page 139, this April 5th, 1913.

[SEAL.] M. P. HUNTER,
Clerk,
By G. S. FRINK,
D. C.

On the 10th day of April, 1913, entry of appeal was filed, which said entry is as follows:

Entry of Appeal.

In the Circuit Court, Third Judicial Circuit, in and for Hamilton County, Florida.

In Chancery.

B. F. CARTER, Complainant,

vs.

ROME INSURANCE COMPANY et al., Defendants.

Come now defendants, Rome Insurance Company, American Bank & Trust Company, trustee and the First National Bank of Rome, Georgia, by Kay & Doggett, their solicitors and counsel, and not appearing generally but appearing specially, solely and only and limiting the appearing to what in contemplation of law, amounts only and solely to a special appearance, enter their appeal to the Supreme Court of Florida, from the order and decree of the Circuit
169 Court of Hamilton County, Florida, in Chancery, made and entered on the 14th day of March, A. D. 1913, overruling the motion of the said defendants, filed under the original bill of complaint herein, to quash the pretended service by publication attempted to be had herein on the said defendants, the said defendants having appeared specially in the said Circuit Court of Hamilton County under complainant's original bill herein, solely and only for the purpose of moving the Court to quash and set aside the said attempted and pretended service.

And the said defendants not appearing generally but appearing specially, as aforesaid, enter their further appeal to the Supreme Court of Florida from a second order and decree of said Circuit Court of Hamilton County, Florida, in chancery, made and entered on the 3rd day of April, A. D. 1913, overruling the motion of the said defendants filed under the amended bill of complaint herein to quash the pretended service by publication attempted to be had herein on the said defendants, the said defendants having appeared specially

in the said Circuit Court of Hamilton County, under complainant's amended bill herein, solely and only for the purpose of moving the Court to quash and set aside the said attempted and pretended service. And the said appeals are made returnable to the second Tuesday of June, A. D. 1913, the same being the tenth day of the said month.

Notice is hereby given to the complainant, B. F. Carter, of the taking and entry of the said appeals, and the Clerk of the said Circuit Court is hereby directed to forthwith enter and record this entry and motion of appeal in the chancery order book of the said Circuit Court as provided by law.

KAY & DOGGETT
Attorneys and Solicitors,
Appearing Specially, Solely, and Only for the
Purpose of Appealing from said Order.

110 Duly recorded in Chancery Order Book No. 3, page 249, this 10th day of April, A. D. 1913.

[SEAL.] M. P. HUNTER,
Clerk,
By G. S. FRINK,
D. C.

In the Circuit Court of Florida, Third Judicial Circuit, in and for Hamilton County, Florida.

In Chancery.

B. F. CARTER

vs.

ROME INSURANCE COMPANY et al.

Application for Supersedeas.

Come now the defendants, Rome Insurance Company, American Bank & Trust Company, Trustee, and First National Bank of Rome, Georgia, by Kay & Doggett, their Solicitors and Counsel, and not appearing generally, but appearing specially, solely and only and limiting this appearance to what, in contemplation of law, amounts only and solely to a special appearance, apply to the said Court for an order granting and fixing the terms of a supersedeas on the appeal of said defendants heretofore entered and recorded in said cause, on the 10th day of April, A. D. 1913.

And further that said order shall operate as of and from the said date of said entry of appeal.

KAY & DOGGETT,
Attorneys and Solicitors,
Appearing Specially, Solely, and Only for the
Purpose of said Appeal.

111 In the Circuit Court of Florida, Third Judicial Circuit, in and for Hamilton County, Florida.

In Chancery.

B. F. CARTER

vs.

ROME INSURANCE COMPANY et al.

Notice to Solicitors for Complainant of Application for Supersedeas.

To Messrs. S. S. Sandford and Carter & McCollum, solicitors for complainant herein:

You will please take notice that on the 19th day of April, A. D. 1913, or as soon thereafter as Counsel can be heard, we shall apply to the Honorable M. F. Horne, Judge of said Court, at his office in Jasper, Florida, for an order granting the foregoing application for a supersedeas.

KAY & DOGGETT,
Attorneys and Solicitors for Defendants Rome Insurance Company, American Bank & Trust Company, Trustee, and First National Bank, Rome, Georgia, Appearing Only and Solely for the Purpose of This Appeal.

We, S. S. Sandford, and Carter & McCollum, Solicitors for the above named Complainant, do hereby acknowledge the receipt of a copy of the foregoing application of notice this the 12th day of April, A. D. 1913. We agree that this notice shall in no sense operate as a general appearance in the above cause.

S. S. SANDFORD,
CARTER & McCOLLUM,
Solicitors for Complainant.

112 *Order Granting Supersedeas.*

In the Circuit Court of Florida, Third Judicial Circuit, in and for Hamilton County, Florida.

In Chancery.

B. F. CARTER

vs.

ROME INSURANCE COMPANY et al.

This cause coming on to be heard upon the foregoing application of the defendant, Rome Insurance Company, American Bank & Trust

Company, trustee, and First National Bank of Rome, Georgia, for an order granting and fixing the terms of a supersedeas on appeal:

And the Court having duly inspected the record herein and it appearing that the said defendants have taken and entered their appeal to the Supreme Court of Florida, from an order and decree of this Court made on the 14th day of March, 1913, overruling the said defendant's motion to quash service under the original bill herein filed; that the said defendants have taken and entered their further appeal from an order and decree of this Court made on the 3rd day of April, 1913, overruling the said defendants' motion to quash service under the amended bill herein filed, that these said appeals are made returnable to a day more than thirty and not less than ninety days from the date of the recording of the said appeals, to-wit: the second Tuesday of June, A. D. 1913, the same being the tenth day of said month.

It is therefore ordered, adjudged and decreed that the said appeals operate as a supersedeas as of and from the said 19th day of April, 1913, and that all proceedings herein be stayed pending said appeals and until the final disposition thereof upon the giving by the said defendants of a bond in terms as provided by law, payable to the complainant, B. F. Carter, to be approved by the Clerk of the
113 Circuit Court, in the sum of $250.00, conditioned to pay all of the costs which may be occasioned by the entry and prosecution of said appeals if said decree of the said Circuit Court shall be affirmed by the said Supreme Court.

Done and ordered and decreed this 19th day of April, A. D. 1913.

M. F. HORNE,
Judge.

Duly recorded in Circuit Court Minute Book No. 11, page 139, this April 19th, 1913.

[SEAL.]

M. P. HUNTER,
Clerk.

By G. S. FRINK,
D. C.

On the 3rd day of May, 1913, the defendants filed their Supersedeas Bond, which, with the approval thereof by the Clerk, is in words and figures as follows:

Supersedeas Bond.

In the Circuit Court of Florida, Third Judicial Circuit, in and f
Hamilton County.

In Chancery.

B. F. CARTER

vs.

ROME INSURANCE COMPANY et al.

Know all men by these presents that we, Rome Insurance Co
pany, a corporation, American Bank and Trust Company, a corpo
tion, Trustee, and the First National Bank of Rome, Georgia, a co
poration, as Principals and the American Surety Company of N
York, a corporation, as Surety, are held and firmly bound unto B F
Carter, his executors, administrators and assigns, in the sum of T
Hundred and fifty dollars ($250.00) lawful money of t
114 United States of America, for the payment whereof well a
truly to be made, we bind ourselves and our assigns, joint
and severally, firmly by these presents, this bond being a supersed
bond on a special appeal from two orders of the said Circuit Co
overruling two motions of the defendants, Rome Insurance Co
pany, American Bank & Trust Company, Trustee, and the Fi
National Bank of Rome, Georgia, to quash the service by publicat
herein attempted to be had upon them, the said motions being ma
under a special appearance and the said defendants not having
peared generally in the said Circuit Court, but only specially for
purpose of making said motion, and this bond is limited to such
supersedeas bond, solely and only for the purpose of the said app
and is in no way to constitute a general appearance in the cause
any of the said defendants.

Signed and sealed by the said Rome Insurance Company, a co
poration, American Bank & Trust Company, a corporation, Trust
and the First National Bank of Rome, Georgia, a corporation, b
their respectively duly authorized officers, on this the 29th day
April, A. D. 1913, at Rome, Georgia, and by the said Americ
Surety Company of New York, by W. E. Kay, its Resident Vi
President, duly authorized to execute this bond at Jacksonvil
Florida, on this 2nd day of May, A. D. 1913.

The condition of this obligation is such that whereas the said d
fendants in the above entitled cause have taken and entered the
special appeal to the Supreme Court of Florida, from an order a
decree of the said Circuit Court in chancery, made and entered
the 14th day of March, 1913, overruling the motion of the said d
fendants filed under the original bill of complaint herein to qu
the pretended service by publication attempted to be had on the s
defendants; and whereas the said defendants have taken and ent
their further special appeal from a second order and decree of the s

Circuit Court in chancery, made and entered on the 3rd day
115 of April, 1913, overruling the motion of the said defendants filed under the amended bill of complaint herein to quash the pretended service by publication attempted to be had herein on the said defendants, both of the said special appeals having been made returnable to the second Tuesday of June, A. D. 1913, same being the tenth day of the said month, and whereas by a further order and decree of the said Circuit Court it was ordered that the said special appeals operate as a supersedeas, and that all proceedings in said suit be stayed until final disposition thereof upon the defendants giving bond payable to the said complainant in the sum of Two Hundred and Fifty Dollars ($250.00) conditioned to pay all costs which may be occasioned by the entry and prosecution of said special appeals, if said decree shall be affirmed by said Supreme Court.

Now, therefore, if the said defendants shall pay or cause to be paid all costs which may be occasioned by the entry and prosecution of said special appeals, if the said decrees appealed from shall be affirmed by said Supreme Court, then this obligation to be void; otherwise to remain in full force and virtue.

[SEAL.] ROME INSURANCE CO.,
By J. C. PORTER,
Vice-Pres.
FIRST NATIONAL BANK,
By B. F. HUGHES,
Pres.
AMERICAN BANK & TRUST CO.,
Trustee, NOW
STATE BANK OF ROME,
By J. H. O'NEILL,
1st V. P.
[SEAL.] AMERICAN SURETY COMPANY,
By W. E. KAY,
Residing Vice-President.

Attest:
[SEAL.] J. R. SEAL,
Secretary Rome Ins. Co.

Attest:
W. M. STOCKTON,
Resident Assistant Secretary.

116 Taken and approved by me this 3rd day of May, 1913.
M. P. HUNTER,
[SEAL.] *Clerk of said Court.*

On the 28th day of April, 1913, assignment of errors, with service of copy on opposing counsel, was filed, which is in words and figures, as follows:

Assignment of Errors.

On the Circuit Court of Florida, Third Judicial Circuit, in and for Hamilton County, Florida.

In Chancery.

B. F. CARTER

vs.

ROME INSURANCE COMPANY et al.

Come now the defendants, Rome Insurance Company, American Bank & Trust Company, Trustee, and First National Bank of Rome, Georgia, by Kay & Doggett, their solicitors and counsel, and not appearing generally, but appearing specially, solely and only, and limiting their appearance to what, in contemplation of law, amounts only and solely to a special appearance, and at the time of filing their directions to the Clerk for making up a transcript herein, assign the following errors, upon which they intend to rely for a reversal by the Supreme Court of the State of Florida of the orders and decrees herein appealed from, to-wit:

First. That the Court erred in overruling the motion of the defendants herein, Rome Insurance Company, American Bank & Trust Company, Trustee, and the First National Bank of Rome, Georgia, filed under the original bill herein to quash service by publication attempted to be had upon said defendants.

117 Second. That the Court erred in overruling the motion of the defendants, Rome Insurance Company, American Bank and Trust Company, Trustee, and the First Nationad Bank of Rome, Georgia, filed under the amended bill herein to quash service by publication attempted to be had upon the said defendants.

KAY & DOGGETT,
Attorneys and Solicitors for said Defendants, Appearing Only Specially for the Purpose of said Appeal.

Copy of foregoing assignment of errors received and service thereof accepted, this 26th day of April, 1913.

S. S. SANDFORD,
CARTER & McCOLLUM,
Solicitors for Complainant.

On the 28th day of April, 1913, written direction to the Clerk for making up the transcript of record, with service of copy to opposing counsel, was filed which is in words and figures as follows:

Directions to Clerk.

In the Circuit Court of Florida, Third Judicial Circuit, in and for Hamilton County.

In Chancery.

B. F. CARTER

vs.

ROME INSURANCE COMPANY et al.

Comes now the defendants, Rome Insurance Company, American Bank & Trust Company, Trustee, and First National Bank of Rome, Georgia, by Kay & Doggett, their Solicitors and Counsel, and not appearing generally but appearing specially, solely and only and limiting their appearance to what in contemplation of law,
118 amounts only and solely to a special appearance, and hereby direct the Clerk of the aforesaid Court to commence the making up of the transcript of record in the above case on the 14th day of May, A. D. 1913, and in the making of said transcript, the said Clerk will be governed by the following direction-, and instruction-, to-wit:

1st. Recite the filing of the original bill, January 3rd, 1913.

2nd. Copy the original Bill of Complaint, filed January 3rd, 1913.

3rd. Recite the filing of the affidavit of B. F. Carter, January 3rd, 1913.

4th. Copy the affidavit of B. F. Carter, filed January 3rd, 1913.

5th. Recite the issuing of the order of publication on the aforesaid defendants, January 3rd, 1913.

6th. Copy order of publication on the said defendants issued January 3rd, 1913.

7th. Recite the filing of the special appearance and motion to quash by the aforesaid defendants, February 20th, 1913.

8th. Copy special appearance and motion to quash, filed February 20, 1913.

9th. Recite the filing of affidavit of publication, February 25th, 1913.

10th. Recite the filing of the certificate of the Clerk February 25th, 1913, that the order of publication was made.

119 11th. Recite the filing of the order of the Court allowing the complainants to file the amended bill, overruling motion of aforesaid defendants under the original bill to quash service at-

tempted to be had upon them by publication, the said order being filed March 14th, 1913.

12th. Copy the said order of the Court filed March 14th, 1913.

13th. Recite the filing of the amended bill, March 24, 1913.

14. Copy the amended bill filed March 24, 1913.

15. Recite the filing of the motion to squash service under the amended bill by the defendants aforesaid under special appearance filed April 3rd, 1913.

16th. Copy the said special appearance and motion to quash under the amended bill filed April 3rd, 1913.

17th. Recite the filing of the order of the Court, overruling the motion of the said defendants under the amended bill to quash service attempted to be had upon them, the said order being filed April 5th, 1913.

18th. Copy the said order of the Court filed April 5th, 1913.

19th. Recite the filing of the entry of appeal, April 10th, 1913.

20th. Copy the entry of appeal filed April 10th, 1913, the certificate showing record of the same in accordance with the law.

21st. Copy the application for order of supersedeas, notice of such application, the acknowledgment of such notice, and the order granting and fixing the terms of supersedeas.

120 22nd. Recite the filing of and copy supersedeas bond, and the order approving same.

23rd. Recite the filing of and copy assignment of errors, and service of copy on opposing counsel.

24th. Recite the filing of and copy directions to the Clerk for the preparation of the transcript and service of copy to opposing counsel.

25th. Certify as to the correctness of the transcript in accordance with law.

26th. Omit all other papers.

KAY & DOGGETT,
Attorneys and Solicitors for said Defendants,
Appearing Only Specially for the Purpose of This Appeal.

Copy of the foregoing directions to the Clerk, received on this 26 day of April, A. D. 1913.

S. S. SANDFORD,
CARTER & McCOLLUM,
Solicitors for Complainants.

STATE OF FLORIDA,
Hamilton County:

I, Melvin P. Hunter, Clerk of the Circuit Court of the Third Judicial Circuit, in and for Hamilton County, Florida, do hereby certify that the foregoing pages numbered from one to thirty-seven inclusive, contain a correct transcript of the record of the order of the said Court entered the 14th day of March, A. D. 1913 overruling the motion to quash service attempted to be had upon the defendants, Rome Insurance Company, American Bank & Trust Company, Trustee, and the First National Bank of Rome, Georgia, filed under the original bill of complaint, and a correct transcript of the record of the order of the said Court entered the 3rd day of April, A. D.
121 1913, overruling the motion to squash service attempted to be had upon the defendants, Rome Insurance Company, American Bank & Trust Company, Trustee and the First National Bank of Rome, Georgia, filed under the amended bill of complaint, these orders and this transcript of record being those of the cause in Chancery of B. F. Carter, complainant, against the Rome Insurance Company, et al., defendants, and this transcript being a true and correct recital and copy of all such papers and proceedings in such cause as appears upon the records and files in my office that have been directed to be included in said transcript by the written demands of said parties.

In witness whereof, I have hereunto set my hand and affixed the seal of the said Circuit Court, this 2nd day of May, A. D. 1913.

[SEAL.] MELVIN P. HUNTER,
Clerk of the Circuit Court in and for
Hamilton County, Florida.

In the Supreme Court of Florida, June Term, A. D. 1913.

ROME INSURANCE COMPANY, a Georgia Corporation, and Others,
Appellants,

vs.

B. F. CARTER, Appellants.

HAMILTON COUNTY:

Per Curiam:

This case cannot be distinguished from that of Rome Insurance Co., vs. J. H. Corbett, this day decided, and upon the opinion therein, the order herein appealed from is affirmed.

All concur.

"Exhibit E."

122 In the Supreme Court of Florida, June Term, A. D. 1913.

ROME INSURANCE COMPANY, a Georgia Corporation, and Others, Appellants,

vs.

J. H. CORBETT, Appellee.

Hamilton County.

COCKRELL, *J.:*

A bill was filed in the Circuit Court for Hamilton County against local defendants and also certain non-resident corporations, seeking to impound a fund in that county arising out of an alleged fraudulent transaction consummated in that county, constructive service, in perfect accordance with the statute, was had by publication, and the non-resident corporation appeared specially to quash the service upon the theory that the sole relief prayed was in personam, and that therefore the statute authorizing constructive service by publication does not apply. This motion having been denied these non-residents have sued out what they term a special appeal.

It may well be that this appeal so operates as a general appearance in the Circuit Court, as to render the question before us a moot one, but the appellee does not ask us to so hold, and it appears that his is but a test case, upon the decision of which many other cases in that Court are depending.

The bill confines its prayers to an adjudication of the fund sought to be impounded, and does not pray for a general personal decree against these non-residents, and we are not to assume upon the face of the bill that the Circuit Court will enter an unauthorized decree; and we have not before us any such question of jurisdiction as was involved in the case of Pennoyer vs. Neff, 95 U. S. 714.

123 The purpose of the statute authorizing constructive service by publications to notify non-residents of the pending suit so that they may if they care to do so, come onto the case, and if the statute be followed, there is no right in the non-resident to quash this notice; he has his right if not waived, to object should the Court thereafter commit an error against him.

Our constructive service statute is broad enough to apply to any suit in equity pending in our Circuit Courts, and as — been said in Kilpatrick vs. Post, 53 N. J. Eq. 591, 32 Atl. Rep. 267, cannot be confined in its operation to the cases where the Court might make final decree or judgment. Further that Court says, "It was not intended that the question of the power to enter the ultimate decree or judgment should enter into the question of the right to give notice of the suit to a non-resident, or that this question of jurisdiction should be settled on a motion to discharge the order of publication. The complainant is entitled to have the question of jurisdiction settled by a final decree,"

We are not to be understood as holding that the Court might not quash a service by publication, if the bill upon its face showed that it was clearly a common law of action, and that the resort to the equity side of the Court was a subterfuge; the bill before us does not present that case.

The order is affirmed.

Shackleford, C. J., and Taylor, Hocker and Whitfield, JJ., Concur.

"Exhibit F."

124 *Mandate from the Supreme Court.*

THE STATE OF FLORIDA:

To the Honorable the Judge of the Circuit Court for the Third Judicial Circuit of Florida, Greeting:

Whereas, Lately in and for the circuit Court of the third Judicial Circuit of Florida, in and for the county of Hamilton, in a cause wherein B. F. Carter was complainant, and Rome Insurance Company, a corporation, American Bank & Trust Company, a Corporation, First National Bank of Rome, Georgia, a Corporation, and Bank of Jasper, a Corporation, were defendants, the Order of said Circuit Court was rendered April 15th, 1913 as by the inspection of the transcript of the record of the said Circuit Court, which was brought into the Supreme Court of the State of Florida; by virtue of an appeal agreeably to the Laws of said State in such case made and provided, fully and at large appears;

And whereas, at the June Term of said Supreme Court holden at Tallahassee, A. D. 1913, the said cause came on to be heard before the said Supreme Court on the said transcript of the record, and was argued by counsel; in consideration whereof, on the 9th day of December, A. D. 1913, it was considered by said Supreme Court that the said order of the Circuit Court be and the same is hereby affirmed; it is further ordered that the appellee do have and recover of and from the appellants his costs by him in this behalf expended, which costs are taxed at the sum of —; therefore,

You are hereby commanded, that such further proceedings be had in said cause as according to right, justice, the judgment of said Supreme Court, and the laws of the State of Florida, ought to be had.

Witness the Honorable Thomas M. Shackleford Chief Justice of said Supreme Court, and the seal of said Court at Tallahassee, this 10th day of January, 1914.

January 10, 1914.

125 Original mailed to Clerk, Circuit Court for Hamilton, Fla.

[SEAL.]

N. H. MABRY,
Clerk Supreme Court of Florida.

"Exhibit G."

In the Circuit Court of Florida, Third Judicial Circuit, in and for Hamilton County, Florida.

In Chancery.

A. L. WISE, Complainant,

vs.

ROME INSURANCE COMPANY et al., Defendants.

Special Appearance to Quash Pretended Service by Publication on Rome Insurance Company, American Bank & Trust Company, Trustee, and First National Bank of Rome, Georgia.

Comes now defendants, Rome Insurance Company, American Bank and Trust Company, Trustee, and First National Bank of Rome, Georgia, by Kay and Doggett, their Solicitors and Counsel, and not appearing generally, but appearing specially, solely and only, and limiting this appearance to what, in contemplation of law, amounts only and solely to a special appearance for the purpose of quashing the attempted and pretended service herein, to that end do hereby move to quash said service upon the following grounds, to-wit:

1st. Because, on account of the attempted and pretended service by publication, the Court does not acquire jurisdiction of said defendants.

2nd. Because said service is defective and not such as is required by law, in that the defendants are foreign corporations, not
126 resident in Florida, and have not received personal service of process herein in the State of Florida, and to vacate and hold said pretended and attempted service by publication upon these defendants to be for naught; and these defendants pray the judgment of this Honorable Court whether they will be compelled to appear herein, or answer hereto, because of the many defects in said pretended service, by reason of which no legal service has been had upon the said defendants, nor have said defendants accepted service herein, nor have they voluntarily appeared herein, nor have they waived due service of process upon them.

KAY & DOGGETT,
Attorneys and Solicitors,
Appearing Specially, Solely, and Only for the Purpose of This Motion, and Limiting the Same to Said Purpose.

"Exhibit H."

In the Circuit Court of Florida, Third Judicial Circuit, in and for Hamilton County, Florida.

In Chancery.

A. L. WISE, Complainant,

vs.

ROME INSURANCE COMPANY et al., Defendants.

Special Appearance to Quash Pretended Service by Publication on Rome Insurance Company, American Bank & Trust Company, Trustee, and First National Bank of Rome, Georgia.

Comes now defendants, Rome Insurance Company, American Bank and Trust Company, Trustee, and First National Bank of Rome, Georgia, by Kay and Doggett, their Solicitors and Counsel, and not appearing generally, but appearing specially, solely and only, and limiting this appearance to what, in contem-
127 plation of law, amounts only and solely to a special appearance for the purpose of quashing the attempted and pretended service herein, to that end do hereby move to quash said service, and to vacate and hold said pretended and attempted service by publication upon these defendants to be for naught, upon the following grounds, to-wit:

1st. Because, on account of the attempted and pretended service by publication, the Court does not acquire jurisdiction of said defendants.

2nd. Because said service is defective and not such as is required by law, in that the defendants are foreign corporations, not resident in Florida, and have not received personal service of process herein in the State of Florida.

3rd. Because this is an action in personam, and said defendants have not received personal service of process herein in the State of Florida.

4th. Because as appears upon the face of the record in this cause, legal service of process has not been had upon the said defendants.

And these defendants pray the judgment of this Honorable Court whether they will be compelled to appear herein, on answer hereto, because of the many defects in said pretended service by reason of which no legal service has been had upon the said defendants, nor have said defendants accepted service herein, nor have they voluntarily appeared herein, nor have they waived due service of process upon them.

KAY & DOGGETT,
Attorneys and Solicitors,
Appearing Specially, Solely, and Only for the Purpose of This Motion and Limiting the Same to Said Purpose.

"Exhibit J."

128 *Stipulation of Counsel.*

In the Circuit Court, Third Judicial Circuit, in and for Hamilton County, Florida.

In Chancery.

A. L. WISE

vs.

ROME INSURANCE COMPANY et al.

It is hereby stipulated and agreed by and between S. S. Sandford and Carter & McCullom, Solicitors for the complainant herein, and Kay & Doggett, who have not appeared generally, but who have appeared only specially as Solicitors for the defendants herein, Rome Insurance Company, American Bank & Trust Company, and First National Bank of Rome, Georgia, and who are making this agreement specially, solely for the purposes herein expressed.

That proceedings in this cause be stayed pending the prosecution of an appeal from the orders of the Court overruling the motions of the said defendants to quash service in the case of B. F. Carter vs. Rome Insurance Company, et al., which said case is now on file and being prosecuted in this Court;

That the ultimate decision of the said appeal in the said case of B. F. Carter vs. Rome Insurance Company shall be decisive of the validity of the service by publication on the said defendants in this case, and if the service in the said Carter case be ultimately held defective and ordered quashed, then the service in this case, the validity of which involves identically the same legal questions as that in the Carter case shall be held defective, and shall be quashed; and

That this stipulation of Counsel shall not be considered as constituting a general appearance of the said defendants in this cause;

129 This agreement being signed and entered into this 10th day of April, A. D. 1913.

____ ____.

____ ____.

Solicitors for Complainant.

____ ____.

Solicitors for Defendants Rome Insurance Co., American Bank & Trust Co., and First National Bank of Rome, Ga., Who Have Appeared Only Specially in said Cause.

"Exhibit K."

In the Circuit Court of Florida, Third Judicial Circuit, in and for Hamilton County, Florida.

In Chancery.

J. B. WETHERTON, Complainant,

vs.

ROME INSURANCE COMPANY et al., Defendants.

Special Appearance to Quash Pretended Service by Publication on Rome Insurance Company, American Bank & Trust Company, Trustee, and First National Bank of Rome, Georgia.

Come now defendants, Rome Insurance Company, American Bank and Trust Company, Trustee, and First National Bank of Rome, Georgia, by Kay and Doggett, their Solicitors and Counsel, and not appearing generally, but appearing specially, solely and only, and limiting this appearance to what, in contemplation of law, amounts only and solely to a special appearance for the purpose of quashing the attempted and pretended service herein, to that end do hereby move to quash said service upon the following grounds, to-wit:

130 1st. Because, on account of the attempted and pretended service by publication, the Court does not acquire jurisdiction of said defendants.

2nd. Because said service is defective and not such as is required by law, in that the defendants are foreign corporations, not resident in Florida, and have not received personal service of process herein in the State of Florida.

and to vacate and hold said pretended and attempted service by publication upon these defendants to be for naught; and these defendants pray the judgment of this Honorable Court whether they will be compelled to appear herein, or answer hereto, because of the many defects in said pretended service, by reason of which no legal service has been had upon the said defendants, nor have said defendants accepted service herein, nor have they voluntarily appeared herein, nor have they waived due service of process upon them.

KAY & DOGGETT,
Attorneys and Solicitors, Appearing Specially, Solely, and Only for the Purpose of This Motion and Limiting the Same to said Purpose.

"Exhibit L."

131 In the Circuit Court of Florida, Third Judicial Circuit, in and for Hamilton County, Florida.

In Chancery.

J. B. WETHERINGTON, Complainant,

vs.

ROME INSURANCE COMPANY et al., Defendants.

Special Appearance to Quash Pretended Service by Publication on Rome Insurance Company, American Bank & Trust Company, Trustee, and First National Bank of Rome, Georgia.

Come now defendants, Rome Insurance Company, American Bank and Trust Company, Trustee, and First National Bank of Rome, Georgia, by Kay and Doggett, their Solicitors and Counsel, and not appearing generally, but appearing specially, solely and only, and limiting this appearance to what, in contemplation of law, amounts only and solely to a special appearance for the purpose of quashing the attempted and pretended service herein, to that end do hereby move to quash said service, and to vacate and hold said pretended and attempted service by publication upon these defendants to be for naught, upon the following grounds, to-wit:

1st. Because, on account of the attempted and pretended service by publication, the Court does not acquire jurisdiction of said defendants.

2nd. Because said service is defective and not such as is required by law, in that the defendants are foreign corporations, not resident in Florida, and have not received personal service of process herein in the State of Florida.

3rd. Because this is an action in personam, and said defendants have not received personal service of process herein in the State of Florida.

132 4th. Because as appears upon the face of the record in this cause, legal service of process has not been had upon the said defendants.

And these defendants pray the judgment of this Honorable Court whether they will be compelled to appear herein, or answer hereto, because of the many defects in said pretended service, by reason of which no legal service has been had upon the said defendants, nor have said defendants accepted service herein, nor have they voluntarily appeared herein, nor have they waived due service of process upon them.

KAY & DOGGETT,

Attorneys and Solicitors, Appearing Specially, Solely, and Only for the Purpose of this Motion and Limiting the Same to said Purposes.

"Exhibit M."

Stipulation of Counsel.

In the Circuit Court, Third Judicial Circuit, in and for Hamilton County, Florida.

In Chancery.

J. B. WETHERINGTON

vs.

ROME INSURANCE COMPANY et al.

It is hereby stipulated and agreed by and between S. S. Sandford and Carter & McCollum, Solicitors for the complainant herein, and Kay & Doggett, who have not appeared generally, but who have appeared only specially as Solicitors of the defendants herein, Rome Insurance Company, American Bank & Trust Company, and First National Bank of Rome, Georgia, and who are makig this
133 agreement specially, solely for the purposes herein expressed:

That proceedings in this cause be stayed pending the prosecution of an appeal from the orders of the Court overruling the motions of the said defendants to quash service in the case of B. F. Carter vs. Rome Insurance Company et al., which said cause is now on file and being prosecuted in this Court;

That the ultimate decision of the said appeal in the said case of B. F. Carter vs. Rome Insurance Company shall be decisive of the validity of the service by publication on the said defendants in this case, and if the service in the said Carter case be ultimately held defective and ordered quashed, then the service in this case, the validity of which involves identically the same legal questions as that in the Carter case shall be held defective, and shall be quashed; and

That this stipulation of Counsel shall not be considered as constituting a general appearance of the said defendants in this cause;

This agreement being signed and entered into this 10th day of April, A. D. 1913.

____ ____,

____ ____,

Solicitors for Complainant.

____ ____,

Solicitors for Defendants Rome Insurance Co., American Bank & Trust Co., and First National Bank of Rome, Ga., Who Have Appeared Only Specially in said Cause.

"Exhibit N."

134 In the Circuit Court of Florida, Third Judicial Circuit, in and for Hamilton County, Florida.

In Chancery.

W. M. O'CAIN, Complainant,

vs.

ROME INSURANCE COMPANY et al., Defendants.

Special Appearance to Quash Pretended Service by Publication on Rome Insurance Company, American Bank & Trust Company, Trustee, and First National Bank of Rome, Georgia.

Comes now defendants, Rome Insurance Company, American Bank and Trust Company, Trustee, and First National Bank of Rome, Georgia, by Kay and Doggett, their Solicitors and Counsel, and not appearing generally, but appearing specially, solely and only, and limiting this appearance to what, in contemplation of law, amounts only and solely to a special appearance for the purpose of quashing the attempted and pretended service herein, to that end do hereby move to quash said service upon the following grounds, to-wit:

1. Because, on account of the attempted and pretended service by publication, the Court does not acquire jurisdiction of said defendants.

2nd. Because said service is defective and not such as is required by law, in that the defendants are foreign corporations, not resident in Florida, and have not received personal service of process herein in the State of Florida.

and to vacate and hold said pretended and attempted service by publication upon these defendants to be for naught; and these defendants pray the judgment of this Honorable Court whether they will be compelled to appear herein, or answer hereto, because of the many defects in said pretended service, by reason of which
135 no legal service has been had upon the said defendants, nor have said defendants accepted service herein, nor have they waived due service of process upon them, nor have they voluntarily appeared herein.

KAY & DOGGETT,
Attorneys and Solicitors, Appearing Specially, Solely, and Only for the Purpose of This Motion, and Limiting the Same to said Purpose.

"Exhibit P."

In the Circuit Court of Florida, Third Judicial Circuit, in and for Hamilton County, Florida.

In Chancery.

W. M. O'CAIN, Complainant,

vs.

ROME INSURANCE COMPANY et al., Defendants.

Special Appearance to Quash Pretended Service by Publication on Rome Insurance Company, American Bank & Trust Company, Trustee, and First National Bank of Rome, Georgia.

Come now Defendants, Rome Insurance Company, American Bank and Trust Company, Trustee, and First National Bank of Rome, Georgia, by Kay and Doggett, their Solicitors and Counsel, and not appearing generally, but appearing specially, solely and only, and limiting this appearance to what, in contemplation of law, amounts only and solely to a special appearance for the purpose of quashing the attempted and pretended service herein, to that end do hereby move to quash said service, and to vacate and hold said pretended and attempted service by publication upon these defendants to be for naught, upon the following grounds, to-wit:

136 1st. Because, on account of the attempted and pretended service by publication, the Court does not acquire jurisdiction of said defendants.

2nd. Because said service is defective and not such as is required by law, in that the defendants are foreign corporations, not resident in Florida, and have not received personal service of process herein in the State of Florida.

3rd. Because this is an action in personam, and said defendants have not received personal service of process herein in the State of Florida.

4th. Because as appears upon the face of the record in this cause, legal service of process has not been had upon the said defendants.

And these defendants pray the judgment of this Honorable Court whether they will be compelled to appear herein, or answer hereto, because of the many defects in said pretended service, by reason of which no legal service has been had upon the said defendants, nor have said defendants accepted service herein, nor have they voluntarily appeared herein, nor have they waived due service of process upon them.

KAY & DOGGETT,

Attorneys and Solicitors, Appearing Specially, Solely, and Only for the Purpose of This Motion and Limiting the Same to said Purposes.

"Exhibit Q."

137 *Stipulation of Counsel.*

In the Circuit Court, Third Judicial Circuit, in and for Hamilton County, Florida.

In Chancery.

W. M. O'CAIN

vs.

ROME INSURANCE COMPANY et al.

It is hereby stipulated and agreed by and between S. S. Sandford and Carter & McCollum, Solicitors for the complainant herein, and Kay & Doggett, who have not appeared generally, but who have appeared only specially as Solicitors for the defendants herein, Rome Insurance Company, American Bank & Trust Company, and First National Bank of Rome, Georgia, and who are making this agreement specially, solely for the purposes herein expressed:

That proceedings in this cause be stayed pending the prosecution of an appeal from the orders of the Court overruling the motions of the said defendants to quash service in the case of B. F. Carter vs. Rome Insurance Company, et al., which said case is now on file and being prosecuted in this Court;

That the ultimate decision of the said appeal in the said case of B. F. Carter vs. Rome Insurance Company shall be decisive of the validity of the service by publication on the said defendants in this case, and if the service in the said Carter case be ultimately held defective and ordered quashed, then the service in this case, the validity of which involves identically the same legal questions as that in this case shall be held defective, and shall be quashed; and that this stipulation of Counsel shall not be considered as constituting a general appearance of the said defendants in this cause;

138 This agreement being signed and entered into this 10th day of April, A. D. 1913.

____ ____,
____ ____,
Solicitors for Complainants.

____ ____,
Solicitors for Defendants Rome Insurance Co., American Bank & Trust Co., and First National Bank of Rome, Ga., Who Have Appeared Only Specially in Said Cause.

"Exhibit R."

In the Circuit Court of Florida, Third Judicial Circuit, in and for Hamilton County, Florida.

In Chancery.

J. F. THAGGARD, Complainant,

vs.

ROME INSURANCE COMPANY et al., Defendants.

Special Appearance to Quash Pretended Service by Publication on Rome Insurance Company, American Bank & Trust Company, Trustee, and First National Bank of Rome, Georgia.

Comes now defendant-, Rome Insurance Company, American Bank and Trust Company, Trustee, and First National Bank of Rome, Georgia, by Kay and Doggett, their Solicitors and Counsel, and not appearing generally, but appearing specially, solely and only, and limiting this appearance to what, in contemplation
139 of law, amounts only and solely to a special appearance for the purpose of quashing the attempted and pretended service herein, to that end do hereby move to quash said service upon the following grounds, to wit:

1st. Because, on account of the attempted and pretended service by publication, the Court does not acquire jurisdiction of said defendants.

2nd. Because said service is defective and not such as is required by law, in that the defendants are foreign corporations, not resident in Florida, and have not received personal service of process herein in the State of Florida.

and to vacate and hold said pretended and attempted service by publication upon these defendants to be for naught; and these defendants pray the judgment of this Honorable Court whether they will be compelled to appear herein, or answer hereto, because of the many defects in said pretended service, by reason of which no legal service has been had upon the said defendants, nor have said defendants accepted service herein, nor have they voluntarily appeared herein, nor have they waived due service of process upon them.

KAY & DOGGETT,
Attorneys and Solicitors,
Appearing Specially, Solely, and Only for the Purpose of This Motion and Limiting the Same to said Purpose.

"Exhibit S."

140 In the Circuit Court of Florida, Third Judicial Circuit, in and for Hamilton County, Florida.

In Chancery.

J. F. THAGGARD, Complainant,

vs.

ROME INSURANCE COMPANY et al., Defendants.

Special Appearance to Quash Pretended Service by Publication on Rome Insurance Company, American Bank & Trust Company Trustee, and First National Bank of Rome, Georgia.

Come now defendants, Rome Insurance Company, American Bank and Trust Company, Trustee, and First National Bank of Rome, Georgia, by Kay and Doggett, their Solicitors and Counsel, and not appearing generally, but appearing specially, solely and only, and limiting this appearance to what, in contemplation of law, amounts only and solely to a special appearance for the purpose of quashing the attempted and pretended service herein, to that end do hereby move to quash said service, and to vacate and hold said pretended and attempted service by publication upon these defendants to be for naught, upon the following grounds, to wit:

1st. Because, on account of the attempted and pretended service by publication, the Court does not acquire jurisdiction of said defendants.

2nd. Because said service is defective and not such as is required by law, in that the defendants are foreign corporations, not resident in Florida, and have not received personal service of process herein in the State of Florida.

3rd. Because this is an action in personam, and said defendants have not received personal service of process herein in the State of Florida.

141 4th. Because as appears upon the face of the record in this cause, legal service of process has not been had upon the said defendants.

And these defendants pray the judgment of this Honorable Court whether they will be compelled to appear herein, or answer hereto, because of the many defects in said pretended service, by reason of which no legal service has been had upon the said defendants, nor have said defendants accepted service herein, nor have they voluntarily appeared herein, nor have they waived due service of process upon them.

KAY & DOGGETT,
Attorneys for Solicitors,
Appearing Specially, Solely, and Only for the Purpose of This Motion and Limiting the Same to said Purposes.

Exhibit "T."

Stipulation of Counsel.

In the Circuit Court, Third Judicial Circuit, in and for Hamilton County, Florida.

In Chancery.

J. F. THAGGARD

vs.

ROME INSURANCE COMPANY et al.

It is hereby stipulated and agreed by and between S. S. Sandford and Carter & McCollum, Solicitors for the complainant, herein, and Kay & Doggett, who have not appeared generally, but who have appeared only specially as Solicitors for the defendants herein, Rome Insurance Company, American Bank & Trust Company, and First National Bank of Rome, Georgia, and who are making this agreement specially, solely for the purposes herein expressed:

142 That proceedings in this cause be stayed pending the prosecution of an appeal from the orders of the Court overruling the motions of the said defendants to quash service in the case of B. F. Carter vs. Rome Insurance Company, et al., which said case is now on file and being prosecuted in this Court;

That the ultimate decision of the said appeal in the said case of B. F. Carter vs. Rome Insurance Company shall be decisive of the validity of the service by publication on the said defendants in this case, and if the service in the said Carter case be ultimately held defective and ordered quashed, then the service in this case, the validity of which involves identically the same legal questions as that in the Carter case shall be quashed; and

That this stipulation of Counsel shall not be considered as constituting a general appearance of the said defendants in this cause;

This agreement being signed and entered into this 10th day of April, A. D. 1913.

____ ____,

____ ____,

Solicitors for Complainant.

____ ____,

Solicitors for Defendants Rome Insurance Co., American Bank & Trust Co., and First National Bank of Rome, Ga., Who Have Appeared Only Specially in said Cause.

"Exhibit U."

143 In the Circuit Court of Florida, Third Judicial Circuit, in and for Hamilton County, Florida.

In Chancery.

C. W. SMITH, Complainant,

vs.

ROME INSURANCE COMPANY et al., Defendants.

Special Appearance to Quash Pretended Service by Publication on Rome Insurance Company, American Bank & Trust Company, Trustee, and First National Bank of Rome, Georgia.

Comes now defendant, Rome Insurance Company, American Bank and Trust Company, Trustee, and First National Bank of Rome, Georgia, by Kay and Doggett, their Solicitors and Counsel, and not appearing generally, but appearing specially, solely and only, and limiting this appearance to what, in contemplation of law, amounts only and solely to a special appearance for the purpose of quashing the attempted and pretended service herein, to that end do hereby move to quash said service upon the following grounds, to-wit:

1. Because, on account of the attempted and pretended service by publication, the Court does not acquire jurisdiction of said defendants.

2. Because said service is defective and not such as is required by law, in that the defendants are foreign corporations, not resident in Florida, and have not received personal service of process herein in the State of Florida, and to vacate and hold said pretended and attempted service by publication upon these defendants to be for naught; and these defendants pray the judgment of this Honorable Court whether they will be compelled to appear herein, or answer hereto, because of the many defects in said pretended service, by reason of which no legal service has been had upon the said defendants, nor have said defendants accepted service herein, nor
144 have they waived due service of process upon them, nor have they voluntarily appeared herein.

KAY & DOGGETT,
Attorneys and Solicitors.
Appearing Specially, Solely, and Only for the Purpose of This Motion and Limiting the Same to said Purpose.

"Exhibit V."

In the Circuit Court of Florida, Third Judicial Circuit, in and for Hamilton County, Florida.

In Chancery.

C. W. SMITH, Complainant,

vs.

ROME INSURANCE COMPANY et al., Defendants.

Special Appearance to Quash Pretended Service by Publication on Rome Insurance Company, American Bank & Trust Company, Trustee, and First National Bank of Rome, Georgia.

Come now defendants, Rome Insurance Company, American Bank and Trust Company, Trustee, and First National Bank of Rome, Georgia, by Kay and Doggett, their Solicitors and Counsel, and not appearing generally, but appearing specially, solely and only, and limiting this appearance to what, in contemplation of law, amounts only and solely to a special appearance for the purpose of quashing the attempted and pretended service herein, to that end do hereby move to quash said service, and to vacate and hold said pretended and attempted service by publication upon these defendants to be for naught, upon the following grounds, to-wit:

145 1st. Because, on account of the attempted and pretended service by publication, the Court does not require jurisdiction of said defendants.

2nd. Because said service is defective and not such as is required by law, in that the defendants are foreign corporations, not resident in Florida, and have not received personal service of process herein in the State of Florida.

3rd. Because this is an action in personam, and said defendants have not received personal service of process herein in the State of Florida.

4th. Because as appears upon the face of the record in this cause, legal service of process has not been had upon the said defendants.

And these defendants pray the judgment of this Honorable Court whether they will be compelled to appear herein, or answer hereto, because of the many defects in said pretended service, by reason of which no legal service has been had upon the said defendants, nor have said defendants accepted service herein, nor have they voluntarily appeared herein, nor have they waived due service of process upon them.

KAY & DOGGETT,
Attorneys and Solicitors, Appearing Specially, Solely, and Only for the Purpose of This Motion and Limiting the Same to said Purposes.

"Exhibit W."

146 *Stipulation of Counsel.*

In the Circuit Court, Third Judicial Circuit, in and for Hamilton County, Florida.

In Chancery.

C. W. SMITH

vs.

ROME INSURANCE COMPANY et al.

It is hereby stipulated and agreed by and between S. S. Sandford and Carter & McCollum, Solicitors for the complainant herein, Kay & Doggett, who have not appeared generally, but who have appeared only specially as Solicitors for the defendants herein, Rome Insurance Company, American Bank & Trust Company, and First National Bank of Rome, Georgia, and who are making this agreement specially, solely for the purposes herein expressed:

That proceedings in this cause be stayed pending the prosecution of an appeal from the orders of the Court overruling the motions of the said defendants to quash service in the case of B. F. Carter vs. Rome Insurance Company, et al., which said case is now on file and being prosecuted in this Court;

That the ultimate decision of the said appeal in the said case of B. F. Carter vs. Rome Insurance Company shall be decisive of the validity of the service by publication on the said defendants in this case, and if the service in the said Carter case be ultimately held defective and ordered quashed, then the service in this case, the validity of which involves identically the same legal questions as that in the Carter case shall be held defective, and shall be quashed; and

That this stipulation of Counsel shall not be considered as constituting a general appearance of the said defendants in this cause;

147 This agreement being signed and entered into this 10th day of April, A. D. 1913.

____ ____,
____ ____,
____ ____,

Solicitors for Defendants Rome Insurance Co., American Bank & Trust Co., and First National Bank of Rome, Ga., Who Have Appeared Only Specially in said Cause.

Filed June 15th, 1915.
W. L. DEVORE,
Clerk.

"Exhibit X."

Motion to Strike Replications.

In the District Court of the United States, Southern District of Florida.

FIRST NATIONAL BANK OF ROME, GEORGIA, Plaintiff,

v.

THE BANK OF JASPER, OF JASPER, FLORIDA, Defendant.

Comes now the defendant by S. S. Sandford, and Carter & McCollum, its attorneys, and moves the Court to strike the replications, severally, filed by the Plaintiff to the additional plea of defendant to the 1st, 2nd, 3rd, 4th and 5th, counts of plaintiff's declaration, and defendant's second and third additional pleas to the fifth count of plaintiff's declaration, on the following grounds to be taken and applied, severally, to each of said replications:

148 1. Because said replication does not avoid the allegations of the plea.

2. Because said replication admits the allegations of the plea which has been held by this Court to constitute a good defense.

3. Because said replication presents no issue to be tried.

4. Because said replication sets up no matter which avoid the material allegations of the plea.

5. Because said replication presents the same matter passed upon by this Court in ruling upon plaintiff's demurrer to the plea filed August 3rd, 1914.

6. Because said replication presents wholly immaterial matter.

7. Because said replication is so framed as to prejudice, embarrass and delay the fair trial of the issue.

CARTER & McCOLLUM.
S. S. SANDFORD.

Demurrer to Replications.

In the District Court of the United States, Southern District of Florida.

FIRST NATIONAL BANK OF ROME, GEORGIA, Plaintiff,

v.

THE BANK OF JASPER, OF JASPER, FLORIDA, Defendant.

Now comes the defendant in the above entitled cause by S. S. Sandford, and Carter & McCollum, its attorneys, and demurs,
149 to Plaintiff's replications, severally, to defendant's additional plea to the 1st, 2nd, 3rd, 4th, and 5th, counts, of plaintiff's

declaration, and defendant's 2nd, 3rd, additional pleas to the fifth count of plaintiff's declaration, and says that said replication is bad in substance and insufficient in law.

CARTER & McCOLLUM,
S. S. SANDFORD.

Substantial matters of law to be argued and insisted upon as applicable to said replications, severally.

1. Said replication does not avoid the allegations of the plea.

2. Said replication admits the material allegations of said plea and does not set forth any matter in avoidance of the same.

3. Said replication shows that plaintiff has no cause of action against the defendant.

4. Said replication neither confesses and avoids, or traverses and denies the said plea.

5. Said replication presents no issuable matter in avoidance of said plea.

6. Said replication shows jurisdiction in the State Court, and the entry of a valid decree by said Court.

7. Said replication shows that the said proceedings in the State Court *was* for the purpose of impounding a particular fund and that the decree of the State Court was to that effect, and, therefore, a binding and valid decree without personal service on the plaintiff herein.

8. Said replication shows that the plaintiff in this cause by its own act voluntarily submitted itself to the jurisdiction of the State Court.

150 9. Said replication shows that the plaintiff in this cause voluntarily submitted itself to the jurisdiction of the State Court, and sought affirmative relief therefrom, and, therefore, the final decree entered against it was of binding force and effect.

CARTER & McCOLLUM,
S. S. SANDFORD,
Attorneys for Defendant.

I, Ira J. Carter do hereby certify that I believe the foregoing demurrer is well founded in law.

IRA J. CARTER,
Attorneys for Defendant.

STATE OF FLORIDA,
County of Duval:

Before me personally appeared Ira J. Carter who being first duly sworn, deposes and says that he is one of the Attorneys for the Defendant in the above entitled cause and that the foregoing demurrer is not interposed for the purpose of delay.

IRA J. CARTER.

Sworn and subscribed before me this 5th day of July, 1915.
[SEAL.]
J. T. CRAWLEY,
Notary Public.

Indorsement: Motion to strike and demurrer to replications. Filed July 5, 1915.

151 *Motion for Leave to File.*

In the District Court of the United States in and for the Southern District of Florida.

FIRST NATIONAL BANK OF ROME, GEORGIA, a Corporation, Plaintiff,

v.

THE BANK OF JASPER, of Jasper, Florida, Defendant.

Comes now the Plaintiff in the above entitled cause, by Kay & Doggett, its attorneys, and moves the Court for leave to withdraw from the files of said cause the Replications filed by the Plaintiff herein to the Defendant's Pleas to the first, second, third, fourth, and fifth counts of plaintiff's declaration, and the Plaintiff further moves the Court for leave to file in said cause additional grounds of demurrer to be read in connection with and made a part of the Demurrer hereinbefore filed by the Plaintiff severally to the additional pleas filed by the Defendant herein on August 3, 1914, to the first, second, third, fourth and fifth counts of Plaintiff's Declaration, which said additional grounds of demurrer are hereto attached.

W. E. KAY,
J. L. DOGGETT,
Attorneys for Plaintiff.

In the District Court of the United States in and for the Southern District of Florida.

FIRST NATIONAL BANK OF ROME, GEORGIA, a Corporation, Plaintiff,

vs.

THE BANK OF JASPER, of Jasper, Florida, Defendant.

152 Comes now the Plaintiff in the above entitled cause, by Kay & Doggett, its attorneys, and leave of the Court having been first had and obtained, files as additional grounds of demurrer, to be read into and made a part of the Demurrer heretofore filed by the Plaintiff severally to the additional Pleas filed by the Defendant herein on August 3rd, 1914, to the first, second, third, fourth, and fifth counts of Plaintiff's Declaration, the following:

10. Said Plea is in direct contravention of Section 5242 of the Revised Statutes of the United States which provides that "no attachment," injunction, or execution, shall be issued against such associa-

tions or *its* property before final judgment in any suit, action, or proceeding, in any State, County or Municipal Court."

11. Said Plea shows affirmatively upon its face that the jurisdiction claimed by the State Court in said Chancery suit was claimed to arise through a seizure of certain funds belonging to the Plaintiff herein.

12. Said Plea shows affirmatively upon its face that the jurisdiction claimed by the State Court in said Chancery suit was claimed through an attachment of certain funds belonging to the Plaintiff herein.

13. Said Plea shows affirmatively upon its face that the jurisdiction claimed by the State Court in the Chancery suit was claimed to arise through a seizure of certain funds belonging to the Plaintiff herein, whereby a trust was later declared impressed upon said funds.

14. Said Plea shows affirmatively upon its face that the jurisdiction claimed by the State Court in said Chancery suit was claimed through an attachment of certain funds belonging to the Plaintiff herein, whereby a trust was later declared impressed upon said funds.

15. Said Plea shows affirmatively upon its face that said State Chancery Court claimed jurisdiction in said Chancery suit
153 solely by reason of certain funds belonging to the Plaintiff herein being in the geographical territory over which said Chancery Court's territorial jurisdiction extended, which said funds said Chancery Court proceeded against in rem, thereby attaching said funds in such a manner as to deprive the Plaintiff herein of their use and benefit from the time of the institution of said Chancery suit, in direct contravention of Section 5242 of the Revised Statutes of the United States.

W. E. KAY,
J. L. DOGGETT,
Attorneys for Plaintiff.

We hereby certify that in our opinion, the above grounds of demurrer are well founded in point of law.

J. L. DOGGETT,
W. E. KAY,
Attorneys for Plaintiff.

STATE OF FLORIDA,
County of Duval, ss:

Personally appeared before me a Notary Public for the State of Florida at Large, one H. C. Clark, who being by me first duly sworn deposes and says that he is of counsel for the Plaintiff in the foregoing cause, and that he is duly authorized in its behalf to make this affidavit; and that the above grounds of demurrer are not interposed, or sought to be interposed, by the Plaintiff for the purpose of delay.

HENRY C. CLARK.

Sworn to and subscribed before me this 21 day of Nov. A. D. 1916.

W. L. DEVORE,
Notary Public.

Indorsement: Motion for leave to file additional grounds of Demurrer. Additional Grounds of Demurrer. Filed November 21, 1916.

154 *Petition for Rehearing.*

In the District Court of the United States in and for the Southern District of Florida.

FIRST NATIONAL BANK OF ROME, GEORGIA, a Corporation, Plaintiff,

vs.

THE BANK OF JASPER, of Jasper, Florida, Defendant.

Comes now the Plaintiff in the above entitled cause, by Kay & Doggett, its Attorneys, and moves the Court to grant unto the Plaintiff a re-hearing of Plaintiff's Demurrer to the additional pleas filed by the Defendant herein on August 3, 1914, to the 1st, 2nd, 3rd, 4th, and 5th, counts of Plaintiff's Declaration; and Plaintiff further moves the Court, upon the granting of such re-hearing, the Court consider as a part of said demurrer to said additional Pleas, and as additional grounds of said Demurrer, the said additional grounds of Demurrer which the Plaintiff has filed after leave of Court was first had and obtained to file the same.

W. E. KAY,
J. L. DOGGETT,
Attorneys for Plaintiff.

Indorsement: Petition for re-hearing. Filed Nov. 21, 1916.

In the United States District Court, Southern District of Florida.

56 E. L., 2.

FIRST NATIONAL BANK OF ROME, GEORGIA,

vs.

THE BANK OF JASPER, Jasper, Florida.

This cause coming on to be heard upon the motion of Plaintiff for leave to withdraw replications and file in said cause additional
155 grounds of demurrer, and the petition for rehearing, and the same having been argued and submitted.

It is considered that said motion and petition be and each of them is hereby denied.

Done this February 2, 1917.

RHYDON M. CALL,
District Judge.

Indorsement: Order denying petition and motion. Filed February 2, 1917.

In the United States District Court, Southern District of Florida.

THE FIRST NATIONAL BANK OF ROME, GEORGIA,

vs.

THE BANK OF JASPER, FLORIDA.

This cause coming on to be heard upon the demurrers to and motions to strike the replications filed by plaintiff to defendant's additional pleas to the first, second, third, fourth, and fifth counts of the declaration, and the same having been argued and submitted,

It is considered that said demurrers be and each of them is hereby sustained.

Done this February 2, 1917.

RHYDON M. CALL,
District Judge.

The questions sought to be raised by these replications are the question passed on by this Court in its ruling on the demurrer to the pleas. I adhere to the ruling then made.

RHYDON M. CALL,
Judge.

Indorsement: Order sustaining demurrer, Filed February 2, 1917.

156 *Stipulation.*

In the United States District Court within and for the Southern District of Florida.

FIRST NATIONAL BANK OF ROME, GEORGIA, a Corporation under the Laws of the United States and Doing Business at Rome, Georgia, Plaintiff,

vs.

THE BANK OF JASPER, a Corporation under the Laws of Florida and Doing Business at Jasper, Florida, Defendant.

It is hereby stipulated and agreed by and between the parties in above entitled cause, by and through their respective attorneys of record herein, as follows:

1. That all pleas filed by the defendant herein be withdrawn from the files of this cause save and excepting only the additional pleas filed by the defendant herein on August 3rd, 1914, it being understood and hereby stipulated that the defendant may re-file in said cause said pleas or any of them whenever it may deem it advisable to do so, and that upon the refiling of any or all of said withdrawn pleas, the

record herein as to such re-filed pleas and pleadings subsequent hereto shall stand as it stands with respect to such re-filed pleas at the date of this stipulation.

Signed at Jacksonville, Florida, this 8th day of January, A. D. 1919.

W. E. KAY,
J. L. DOGGETT,
Attorneys for Plaintiff.
O. O. McCOLLUM,
S. S. SANDFORD,
F. P. FLEMING,
Attorneys for Defendant.

Indorsement: Stipulation. Filed Jan. 9, 1919.

157 *Declination to Plead Further.*

In the United States District Court Within and for the Southern District of Florida.

FIRST NATIONAL BANK OF ROME, GEORGIA, a Corporation under the Laws of the United States and Doing Business at Rome, Georgia, Plaintiff,

vs.

THE BANK OF JASPER, a Corporation under the Laws of Florida and Doing Business at Jasper, Florida, Defendant.

Comes now the plaintiff in the above entitled cause, by its undersigned attorneys of record herein, and, in view of the stipulation this day entered into by and between the parties herein, the plaintiff does hereby elect to stand upon its demurrer to defendant's pleas filed herein on August 3rd, 1914, and upon its replications to said pleas, to which replications the Court has sustained a demurrer, and the plaintiff does hereby decline to plead further in this cause.

W. E. KAY,
J. L. DOGGET,
Attorneys for Plaintiff.

Indorsement: Declaration to plead further. Filed Jan. 9, 1919.

In the United States District Court within and for the Southern District of Florida.

FIRST NATIONAL BANK OF ROME, GEORGIA, a Corporation under the Laws of the United States and Doing Business at Rome, Georgia, Plaintiff.

VS.

THE BANK OF JASPER, a Corporation under the Laws of Florida and Doing Business at Jasper, Florida, Defendant.

Comes now the Defendant in the above entitled cause, and moves the Court for the entry of judgment final herein in favor of
158 the defendant, consequent upon the sustaining of defendant's demurrer to the replication of the plaintiff herein filed June the 15th, 1915, to the additional pleas of the defendant herein filed on the 3rd day of August, 1914.

O. O. McCOLLUM,
S. S. SANDFORD,
T. P. FLEMING,
Attorneys for Defendant.

In the United States District Court within and for the Southern District of Florida.

FIRST NATIONAL BANK OF ROME, GEORGIA, a Corporation under the Laws of the United States and Doing Business at Rome, Georgia, Plaintiff.

VS.

THE BANK OF JASPER, a Corporation under the Laws of Florida and Doing Business at Jasper, Florida, Defendant.

This cause came on this day for hearing upon the motion of the defendant for judgment in its favor consequent upon the sustaining of defendant's demurrer to the replication of the plaintiff filed herein in June, 15th, 1915, and it appearing to the Court from the records and files in this cause that the demurrer to said replication was sustained by the Court on the 2nd day of February, 1917, and that the plaintiff has this day filed in said cause its written declination to plead further therein, and has thereby elected to stand upon its demurrer, to defendant's additional pleas filed herein on August 3rd, 1914, which demurrer was over-ruled by the Court, and upon its replication to said pleas, to which replications the Court has sustained demurrer of the defendant.

159 It is thereupon considered by the Court that the said plaintiff, First National Bank of Rome, Georgia, a Corporation under the laws of the United States, take nothing by its said writ and declaration, and that the defendant go hence without day.

It is further considered by the Court that the defendant do have

and recover of and from the plaintiff its costs in this behalf expended, and here taxed at — Dollars, for which execution may issue.

Considered and Ordered at Jacksonville, Florida, this January 9th, 1919.

RHYDON M. CALL,
Judge.

Indorsement: Final judgment. Filed Jan. 9, 1919.

Assignment of Errors.

In the District Court of the United States, Southern District of Florida.

FIRST NATIONAL BANK OF ROME, GEORGIA, a Corporation under the Laws of the United States and Doing Business at Rome, Georgia, Plaintiff,

vs.

THE BANK OF JASPER, a Corporation under the Laws of Florida and Doing Business at Jasper, Florida, Defendant.

And now comes the plaintiff in the above styled cause, by its undersigned Attorneys, and assigns as error the following rulings and decisions of the District Court herein, that is to say:

First. The Court erred in overruling plaintiff's demmurrer to defendant's additional plea to the first count of plaintiff's declaration.

160 This assignment of error is based on the ground that said additional plea attempts to set up as a bar to the cause of action set forth in said first count of the declaration, a chancery decree of the Circuit Court of Hamilton County, Florida, which decree is null and void as to the plaintiff herein, for the reason that said decree was not obtained through due process of law, and is a decree in personam founded solely upon constructive service by publication in an equity suit in personam, in which equity suit the plaintiff herein did not enter a general appearance.

Second. The Court erred in overruling plaintiff's demurrer to defendant's additional plea to the second count of plaintiff's declaration.

This assignment of error is based on the ground that said additional plea attempts to set up as a bar to the cause of action set forth in said second count of the declaration, a chancery decree of the Circuit Court of Hamilton County, Florida, which decree is null and void as to the plaintiff herein, for the reason that said decree was not obtained through due process of law, and is a decree in personam, founded solely upon constructive service by publication in an equity suit in personam, in which equity suit the plaintiff herein did not enter a general appearance.

Third. The Court erred in overruling plaintiff's demurrer to defendant's additional plea to the third count of plaintiff's declaration.

This assignment of error is based on the ground that said additional plea attempts to set up as a bar to the cause of action set forth in said third count of the declaration, a chancery decree of the Circuit Court of Hamilton County, Florida, which decree is null and void as to the plaintiff herein, for the reason that said decree was not obtained through due process of law, and is a decree in personam, founded solely upon constructive — by publication in an equity suit in personam, in which equity suit the plaintiff
161 herein did not enter a general appearance.

Fourth. The Court erred in overruling plaintiff's demurrer to defendant's additional plea to the fourth count of plaintiff's declaration.

This assignment of error is based on the ground that said additional plea attempts to set up as a bar to cause of action set forth in said fourth count of the declaration, a chancery decree in the Circuit Court of Hamilton County, Florida, which decree is null and void as to the plaintiff herein, for the reason that said decree was not obtained through due process of law, and is a decree in personam, founded solely upon constructive service by publication in an equity suit in personam, in which equity suit the plaintiff herein did not enter a general appearance.

Fifth. The Court erred in overruling plaintiff's demurrer to defendant's additional plea to the fifth count of plaintiff's declaration.

This assignment of error is based on the ground that said additional plea attempts to set up as a bar to the cause of action set forth in said fifth count of the declaration, a chancery decree in the Circuit Court of Hamilton County, Florida, which decree is null and void as to the plaintiff herein, for the reason that said decree was not obtained through due process of law and is a decree in personam, founded solely upon constructive service by publication in an equity suit in personam, in which equity suit the plaintiff herein did not enter a general appearance.

Sixth. The Court erred in overruling plaintiff's demurrer to the defendant's additional pleas filed August 3rd, 1914, to the first, second, third, fourth and fifth counts of plaintiff's declaration.

This assignment of error is based on the ground that each of said additional pleas attempts to set up as a bar to the causes of
162 action set forth in said first, second, third, fourth and fifth counts of the declaration, a chancery decree of the Circuit Court of Hamilton County, Florida, which decree is null and void as to the plaintiff herein, for the reason that said decree was not obtained through due process of law, and is a decree in personam, founded solely upon constructive service by publication in an equity suit in personam, in which equity suit the plaintiff herein did not enter a general appearance.

Seventh. The Court erred in denying plaintiff's motion filed November 21st, 1916, for leave to withdraw replications and file additional grounds of demurrer.

This assignment of error is based on the ground that defendant's additional pleas, and each of them, contravene Section 5242 of the Revised Statutes of the United States and that said pleas are therefore bad.

Eighth. The Court erred in denying plaintiff's petition for rehearing filed November 21st, 1916.

This assignment of error is based on the ground that the many questions of law involved in plaintiff's demurrer to defendant's additional pleas, including additional grounds of demurrer which plaintiff requested leave to file, were of such importance that a rehearing should be granted, particularly since the Court had not, at the first hearing, considered or had before in the additional grounds of demurrer.

Ninth. The Court erred in sustaining defendant's demurrer to plaintiff's replication to defendant's additional plea to the first count of plaintiff's declaration.

This assignment of error is based on the ground that said replication shows and sets forth any and all proceedings in said Chancery suit in the Circuit Court of Hamilton County, Florida, in which the plaintiff herein participated in any manner whatsoever and thereby shows that said additional plea attempts to set up as a bar to the cause of action set forth in said first count of the declara-
163 tion, a chancery decree of the Circuit Court of Hamilton County, Florida, which decree is null and void as to the plaintiff herein for the reason that said decree was not obtained through due process of law, and is a decree in personam, founded solely upon constructive service by publication in an equity suit in personam, in which equity suit the plaintiff herein did not enter a general appearance.

Tenth. The Court erred in sustaining defendant's demurrer to plaintiff's replication to defendant's additional plea to the second count of plaintiff's declaration.

This assignment of error is based on the ground that said replication shows and sets forth any and all proceedings in said chancery suit in the Circuit Court of Hamilton County, Florida, in which the plaintiff herein participated in any manner whatsoever, and thereby shows that said additional plea attempts to set up as a bar to the cause of action set forth in said second count of the declaration, a chancery decree of the Circuit Court of Hamilton County, Florida, which decree is null and void as to the plaintiff herein, for the reason that said decree was not obtained through due process of law, and is a decree in personam founded solely upon constructive service by publication in an equity suit in personam, in which equity suit the plaintiff herein did not enter a general appearance.

Eleventh. The Court erred in sustaining defendant's demurrer to plaintiff's replication to defendant's additional plea to the third count of plaintiff's declaration.

This assignment of error is based on the ground that said replication shows and sets forth any and all proceedings in said chancery suit in the Circuit Court of Hamilton County, Florida, in which the plaintiff herein participated in any manner whatsoever, and thereby shows that said additional plea attempts to set up as a bar to the cause of action set forth in said third count of the declaration, a chancery decree of the Circuit Court of Hamilton
164 County, Florida, which decree is null and void as to the plaintiff herein, in that said decree was not obtained through due process of law, and is a decree, in personam founded solely upon constructive service by publication in an equity suit in personam, in which equity suit the plaintiff herein did not enter a general appearance.

Twelfth. The Court erred in sustaining defendant's demurrer to plaintiff's replication to defendant's additional plea to the fourth count of plaintiff's declaration.

This assignment of error is based on the ground that said replication shows and sets forth any and all proceedings in said chancery suit in the Circuit Court of Hamilton County, Florida, in which the plaintiff herein participated in any manner whatsoever, and thereby shows that the said additional plea attempts to set up as a bar to the cause of action set forth in said fourth count of the declaration, a chancery decree of the Circuit Court of Hamilton County, Florida, which decree is null and void as to the plaintiff herein, for the reason that said decree was not obtained through due process of law, and is a decree in personam, founded solely upon constructive service by publication in an equity suit in personam, in which equity suit the plaintiff herein did not enter a general appearance.

Thirteenth. The Court erred in sustaining defendant's demurrer to plaintiff's replication to defendant's additional plea to the fifth count of plaintiff's declaration.

This assignment of error is based on the ground that said replication shows and sets forth any and all proceedings in said chancery suit in the Circuit Court of Hamilton County, Florida, in which the plaintiff herein participated in any manner whatsoever, and thereby shows that said additional plea attempts to set up as a bar to the cause of action set forth in said fifth count of the declaration, a chancery decree of the Circuit Court of Hamilton County,
165 Florida, which decree is null and void as to the plaintiff herein, for the reason that said decree was not obtained through due process of law, and is a decree in personam founded solely upon constructive service by publication in an equity suit in personam, in which equity suit the plaintiff herein did not enter a general appearance.

Fourteenth. The Court erred in sustaining the demurrer to the replications filed by plaintiff to defendant's additional pleas to the first, second, third, fourth and fifth counts of the declaration.

This assignment of error is based on the ground that said replications show and set forth any and all proceedings in said chancery suit in the Circuit Court of Hamilton County, Florida, in which the plaintiff herein participated in any manner whatsoever, and thereby show that said additional pleas attempt to set up as a bar to the cause of action set forth in said first, second, third, fourth, and fifth counts of the declaration, a chancery decree of the Circuit Court of Hamilton County, Florida, which decree is null and void as to the plaintiff herein, for the reason that said decree was not obtained through due process of law, and is a decree in personam, founded solely upon constructive service by publication in an equity suit in personam, in which equity suit the plaintiff herein did not enter a general appearance.

Fifteenth. The Court erred in entering final judgment on demurrer for defendant.

This assignment of error is based on the ground that — the facts set forth in defendant's additional pleas and in plaintiff's replications thereto, which facts are admitted under the pleadings, it affirmatively appears that said pleas set forth no defense to the cause of action set forth in the first, second, third, fourth and fifth counts of plaintiff's declaration.

166 Wherefore, and for divers other grounds appearing upon the record plaintiff prays that the said several rulings, decisions and judgment may be reversed.

W. E. KAY,
J. L. DOGGETT,
L. A. DEAN,
J. E. DEAN,
HENRY C. CLARK,
Attorneys for Plaintiff.

Indorsement: Assignment of Errors. Filed May 26, 1919.

Writ of error omitted from the printed record, being filed in the original.

* * * * * * *

Bond for Costs.

In the District Court of the United States, Southern District of Florida.

FIRST NATIONAL BANK OF ROME, GEORGIA, a Corporation under the Laws of the United States and Doing Business at Rome, Georgia, Plaintiff,

vs.

THE BANK OF JASPER, a Corporation under the Laws of Florida and Doing Business at Jasper, Florida, Defendant.

Know all men by these present that C. S. L'Engle and George R. Desaussure are held and firmly bound unto The Bank of Jasper, a Corporation, defendant in the above styled cause, in the penal sum of Five Hundred ($500.00) Dollars, for the payment whereof, 167 well and truly to be made, we do hereby severally bind ourselves and our heirs, executors, administrators and assigns, firmly by these presents.

Signed and sealed this 27 day of May, A. D. 1919.

The condition of the foregoing obligation is such that, whereas the above named First National Bank of Rome, Georgia, has sued out a writ of error from the judgment of the District Court of the United States in and for the Southern District of Florida, rendered on the 9th day of January, A. D. 1919, in a certain cause therein pending wherein the above named First National Bank of Rome, Georgia, was plaintiff, and the said The Bank of Jasper, was defendant, to the United States Circuit Court of Appeals for the Fifth Circuit, returnable before the said Court on the 25th day of June, A. D. 1919; now if the said First National Bank of Rome, Georgia, shall prosecute the said writ of error to effect and answer all costs and damages, if they shall fail to make their plea good, then this obligation shall become null and void and else shall remain in full force and virtue.

G. R. DE SAUSSURE. [SEAL.]
C. S. L'ENGLE. [SEAL.]

Taken and approved by me, this 26 day of May, A. D. 1919.

RHYDON M. CALL,
Judge.

Indorsement: Bond for Costs. Filed May 26, 1919.

Citation.

UNITED STATES OF AMERICA, *ss:*

The President of the United States to the Bank of Jasper, a corporation, Greeting:

You are hereby cited and admonished to be and appear at a Circuit Court of Appeals of the United States, to be holden at
168 New Orleans, Louisiana, on the 15th day of June, A. D. 1919, pursuant to a writ of error filed in the Clerk's office of the District Court of the United States for the Southern District of Florida, wherein First National Bank of Rome, Georgia, a corporation, is plaintiff in error, against you, The Bank of Jasper, a corporation, defendant in error, to show cause, if any there be, why the judgment in said writ of error mentioned, entered on the 9th day of January, 1919, should not be corrected and speedy justice done to the parties in this behalf.

Witness, the Honorable Rhydon M. Call, Judge of the District Court of the United States for the Southern District of Florida, this 26th day of May, A. D. 1919.

RHYDON M. CALL,
Judge.

Attest:

[SEAL.] EDWIN R. WILLIAMS,
Clerk.

Indorsed on Back.

Received this Citation at Jacksonville, Florida, May 26, 1919, and executed it by handing a true copy hereof to Q. Q. McCollum, Attorney of Record for the within-named, The Bank of Jasper, a corporation, Defendant in Error. Done at Jacksonville, Duval County, Florida, this 26th day of May, 1919.

N. H. BOSWELL,
U. S. Marshal,
By J. D. RICHARDSON,
Deputy U. S. Marshal.

Filed May 28, 1919.

EDWIN R. WILLIAMS,
Clerk.

169 *Affidavit of E. P. Owen, Jr.*

In the United States District Court, Southern District of Florida.

FIRST NATIONAL BANK OF ROME, GEORGIA, a Corporation, Plaintiff in Error,

vs.

THE BANK OF JASPER, a Corporation, Defendant in Error.

STATE OF FLORIDA,
County of Duval, ss:

Personally appeared before me, a Notary Public within and for the said State and County, one E. P. Owen, Jr., who, being by me first duly sworn, deposes and says that, on the 27th day of May, A. D. 1919, he did personally deliver a copy of the citation in the above styled cause, personally to O. O. McCollum, Esquire, Attorney of Record for the Bank of Jasper, a corporation.

E. P. OWEN, JR.

Sworn to and subscribed before me on this 27th day of May, A. D. 1919.

[SEAL.] ENNIS BOGGS,
Notary Public of Florida.

My commission expires 7th March, 1921.

Filed May 27, 1919.
EDWIN R. WILLIAMS,
Clerk.

170 *Affidavit of R. L. Frink.*

United States District Court Within and for the Southern District of Florida.

FIRST NATIONAL BANK OF ROME, GEORGIA, a Corporation, Plaintiff in Error,

vs.

THE BANK OF JASPER, a Corporation, Defendant in Error.

STATE OF FLORIDA,
County of Hamilton, ss:

Personally appeared before me, a Notary Public within and for the State of Florida at large, one R. L. Frink, who, being by me first fully sworn, deposes and says that on the 28th day of May, A. D. 1919, he did personally deliver a copy of the citation in the

above styled cause to T. C. Watts, the President of the Bank of Jasper, Florida, a corporation, in the above entitled cause.

R. L. FRINK.

Sworn to and subscribed before me on this 28th day of May, A. D. 1919.

[SEAL.]

F. B. HARRELL.

Filed May 31, 1919.

EDWIN R. WILLIAMS,
Clerk.

171 In the District Court of the United States, Southern District of Florida

FIRST NATIONAL BANK OF ROME, GEORGIA, a Corporation, Plaintiff in Error,

vs.

THE BANK OF JASPER, a Corporation, Defendant in Error.

To the clerk of the above styled court:

In transmitting the record in the above entitled cause to the Clerk of the United States Circuit Court of Appeals, you will please include in such record and the same shall consist of each, severally, of the following:

1. Praecipe for summons filed January 27th, 1913.

2. Summons issued January 27th, 1913, together with the return thereon.

3. Appearance filed March 3rd, 1913.

4. Declaration filed March 3rd, 1913.

5. Stipulation and order of Court filed July 20th, 1914.

6. Additional pleas filed August 3rd, 1914.

7. Demurrer to additional pleas filed September 7th, 1914.

8. Defendant's joinder in demurrer filed September 30th, 1914 (Omit demurrer to additional replications contained in same cover with joinder of issue.)

9. Order of Court dated January 12th, 1915.

10. Motion and Order of Court filed June 15th, 1915.

11. Replications filed June 15th, 1915.

12. Motion to strike and demurrer to replications filed July 5, 1915.

13. Motion for leave to file additional grounds of demurrer, together with such additional grounds of demurrer filed November 21st, 1916.

14. Petition for rehearing filed November 21st, 1916.

15. Order denying *and* petition filed February 2nd, 1917.

16. Order sustain- demurrer filed February 2nd, 1917.

17. Stipulation of Counsel filed January 9th, 1919.

18. Declination to plead further filed January 9th, 1919.

19. Motion for final judgment and final judgment filed January 9, 1919.

20. Assignment of errors filed May 26th, 1919.

21. Writ of Error, dated May 26th, 1919.

22. Bond for costs filed May 26th, 1919.

23. Citation dated May 26th, 1919.

24. Affidavit of E. P. Owen, Jr., as to service of copy of citation and copy of writ of error upon Attorney for Defendant in Error.

25. Affidavit of R. L. Frink as to service of copy of citation and copy of writ of error upon the defendant in error.

26. Directions to the Clerk, with affidavit of service thereof upon O. O. McCollum, Esq., Attorney for Defendant in Error.

27. You will please omit all other papers, pleadings, etc., from the record, for any and all other papers and pleadings are
173 irrelevant and immaterial to the assignments of error.

W. E. KAY,
J. L. DOGGETT,
L. A. DEAN,
J. E. DEAN,
HENRY C. CLARK,
Attorneys for Plaintiff in Error.

To O. O. McCollum, Esquire,
Attorney for Defendant in Error:

You will please take notice of the above and foregoing directions to the Clerk.

W. E. KAY,
J. L. DOGGETT,
L. A. DEAN,
J. E. DEAN,
HENRY C. CLARK,
Attorneys for Plaintiff in Error.

STATE OF FLORIDA,
County of Duval, ss:

Personally appeared before me, a Notary public in and for the State of Florida at large, One E. P. Owen, Jr., who being by me first duly sworn, deposes and says that on the 28th day of May, A. D. 1919, he did personally deliver a copy of the above and foregoing directions to the Clerk in the above styled cause, personally to O. O. McCollum, Esq., Attorney for the Bank of Jasper.

E. P. OWEN, JR.

Sworn to and subscribed before me, this 28th day of May, A. D. 1919.

[SEAL.]

ENNIS BOGGS,
Notary Public, State of Florida, at Large.

My commission expires March 7th, 1921.

Indorsement: Directions to the Clerk. Filed May 28th, 1919.

171 United States District Court, Southern District of Florida.

UNITED STATES OF AMERICA,
Southern District of Florida:

I, Edwin R. Williams, Clerk of the United States District Court in and for the Southern District of Florida, and as such the legal custodian of the records and files of said Court, do hereby certify, that the foregoing typewritten pages and part pages numbered from 1 to 191 both inclusive, constitute a true and correct copy of the original records and proceedings including the assignment of errors in a cause lately pending in this Court wherein the First National Bank of Rome, Georgia, a corporation, is plaintiff and the Bank of Jasper, a corporation, is defendant, as prepared according to directions filed in said cause.

In witness whereof I have hereunto set my hand and affixed the official seal of said Court at Jacksonville in said District, this 4th day of August 1919.

[SEAL.]

EDWIN R. WILLIAMS,
Clerk United States District Court,
Southern District of Florida,
By W. L. DEVORE,
Deputy Clerk.

175 That thereafter the following proceedings were had in said cause in the United States Circuit Court of Appeals for the Fifth Circuit, viz:

Argument and Submission.

Extract from the Minutes of January 26th, 1920.

No. 3431.

FIRST NATIONAL BANK OF ROME, GEORGIA,

versus

THE BANK OF JASPER.

On this day this cause was called, and, after argument by Henry C. Clark, Esq., and W. E. Kay, Esq., for plaintiff in error, and Hilton S. Hampton, Esq., and F. P. Fleming, Esq., for defendant in error, was submitted to the Court.

176 *Opinion of the Court.*

Filed March 10th, 1920.

In the United States Circuit Court of Appeals, Fifth Circuit.

No. 3431.

FIRST NATIONAL BANK OF ROME, GEORGIA, Plaintiff in Error.

versus

THE BANK OF JASPER, Defendant in Error.

Error to the District Court of the United States for the Southern District of Florida.

W. E. Kay, J. L. Doggett, L. A. Dean, J. E. Dean, and Henry C. Clark for Plaintiff in Error.
Hilton S. Hampton and F. P. Fleming for Defendant in Error.

No. 3432.

STATE BANK OF ROME, Plaintiff in Error,

versus

THE BANK OF JASPER, Defendant in Error.

Error to the District Court of the United States for the Southern District of Florida.

W. E. Kay, J. L. Doggett, L. A. Dean, J. E. Dean and Henry C. Clark for Plaintiff in Error.
Hilton S. Hampton and F. P. Fleming for Defendant in Error.

No. 3433.

STATE BANK OF ROME, GEORGIA, Plaintiff in Error,

versus

FIRST NATIONAL BANK OF JASPER, FLORIDA, Defendant in Error.

Error to the District Court of the United States for the Southern District of Florida.

177 W. E. Kay, J. L. Doggett, L. A. Dean, J. E. Dean, and Henry C. Clark for Plaintiff in Error.
Hilton S. Hampton for Defendant in Error.

Before Walker, Circuit Judge, and Grubb and Jack, District Judges.

By the COURT:

The questions presented in these cases are substantially the same as those ruled on in the case of First National Bank of Rome, Georgia, vs. First National Bank of Jasper, Florida, MS. U. S. Circuit Court of Appeals, Fifth Circuit. Present Term. For reasons stated in the opinion rendered in the just cited case the judgment in each of the above numbered and entitled cases is

Reversed.

(Original filed March 10th, 1920.)

178 *Opinion of the Court.*

Filed March 10th, 1920.

In the United States Circuit Court of Appeals, Fifth Circuit.

No. 3430.

FIRST NATIONAL BANK OF ROME, GEORGIA, Plaintiff in Error,

versus

THE FIRST NATIONAL BANK OF JASPER, FLORIDA, Defendant in Error.

Error to the District Court of the United States for the Southern District of Florida.

W. E. Kay, J. L. Doggett, L. A. Dean, J. E. Dean, and Henry C. Clark for Plaintiff in Error.
Hilton S. Hampton, (S. S. Sandford and Hilton S. Hampton on the brief), for Defendant in Error.

Before Walker, Circuit Judge, and Grubb and Jack, District Judges.

GRUBB, *District Judge:*

This was a suit in the District Court upon a certificate of deposit brought by plaintiff in error as plaintiff against the defendant in error as defendant. Judgment for the defendant was based upon a plea that set up as a bar to the suit a decree of the Circuit Court of Hamilton County, Florida, in which one Corbett was plaintiff, and the parties to the present suit and others were defendants. The sufficiency of the plea as a bar to the present suit depends upon (1) its validity and (2) its effect.

179 (1) First as to its validity as against the plaintiff in this suit. At the time the Florida suit was brought the present plaintiff was a non-resident of Florida, and was served by publication under a statute of Florida, permitting such service. The sufficiency of the constructive service was assailed by a motion of the then defendant to set aside or quash the service, which was overruled by the Circuit Court; from the order overruling the motion an interlocutory appeal was taken to the Supreme Court of Florida, which affirmed the order of the Circuit Court for reasons hereafter stated. It is settled that constructive service can only bring non-residents within the jurisdiction of a court where there is a res in the control of the Court in which the non-resident has an interest, and then only for the sole purpose of adjudicating his rights, if any, to the res. Pennoyer vs. Neff, 95 U. S. 714. This is the extent of the jurisdiction of a court to proceed upon substituted service, in the absence of personal service, or appearance. At the foundation of this limited jurisdiction based upon substituted service is the control of a res by the court asserting it. If there is no such res, the court acquires no jurisdiction for any purpose over the person of a non-resident, upon constructive service. The Circuit Court of Hamilton County, Florida, proceeded to final decree in the case of Corbett vs. First National Bank of Jasper and others upon the theory that there was a res, in which the non-residents were interested, in the control of that Court, and the Supreme Court of Florida on appeal took the same view, and sustained the constructive service upon the non-residents upon that idea. The supposed res was the proceeds of a note which the plaintiff Corbett had discounted at the Jasper Bank, for the purpose of paying for shares of the capital stock of the Rome Ins. Co.,
180 which he claimed to have been induced by fraud to purchase. The proceeds of the note were paid to the trustee for the Insurance Company, and immediately deposited by him in the Jasper Bank, which issued its certificate of deposit therefor to the said trustee. The present suit is brought by the holder of the certificate of deposit. It is upon the theory that the proceeds of the note, so deposited in the Jasper Bank, created a specific fund in that bank, control of which could be and was acquired by the Hamilton County Circuit Court by order of that Court restraining its disposition, and thereby impounding it, that the two Florida Courts acted. The cor-

rectness of the theory is essential to the jurisdiction of the Florida Circuit Court, for if there was no fund there could be no jurisdiction acquired by substituted service. The proceeds of Corbett's note, when discounted, were paid to him by the Jasper Bank; and by him to the trustee for the Insurance Company, which deposited them in the Jasper Bank, taking the bank's obligation therefor in the form of its certificate of deposit. Undoubtedly the transaction was accomplished by bookkeeping entries, no money passing. In any event, the proceeds of Corbett's note never became a special deposit or fund, but were mingled with the Jasper Bank's monies indiscriminately when deposited, and the bank's general obligation substituted for the actual money. The certificate of deposit evidenced no particular fund or money, but the obligation of the bank to repay in like amount as deposited out of any of its assets. There being no res in the control of the Circuit Court of Hamilton County, jurisdiction was not conferred on that court over the non-residents by substituted or constructive service. After the Supreme Court of Florida affirmed the appeal from the interlocutory order of the Circuit Court, sus-
181 taining the service, the non-residents made no further appearance or answer, and the final decree, as to them, was one by default.

It is contended by defendant in error that the effect of appealing from the interlocutory order by the plaintiff in error, (defendant in the Corbett suit), was a general appearance on its part in that case, and conferred jurisdiction over its person on the Circuit Court on the remand of the case. The rule in Florida, differing from that which obtains in the Federal Courts, is to the effect that an appellant, though objecting to the sufficiency of service successfully, is considered in court upon the return of the case to the lower court. Conceding that this court will follow the rule of decision in the State Court, in passing upon a judgment in that court, we think the Florida rule did not apply in the Corbett case. The question of its applicability was suggested but not decided by the Supreme Court of Florida in its opinion in that case because the appellee asked that the appeal be decided on another ground. The Supreme Court held that "if the statute be followed, there is no right in the non-resident to quash this notice (by publication); he has the right if not waived, to object should the Court thereafter commit an error against him." The order of the Circuit Court was for that reason affirmed, apparently leaving the sufficiency and effect of the substituted service to be determined by the character of relief awarded against the non-residents upon final decree. The appeal was from an interlocutory order of the Circuit Court, which affected only the question of service. It was not an appeal from a final decree, upon which the insufficiency of service was assigned with other error, as in the cases cited supporting the Florida rule. The Florida statute allowing appeals from interlocutory orders was held by its Supreme Court in the Cor-
182 bett case to cover an order affecting service only. No other question than the rightful presence of the non-residents in the Circuit Court by virtue of the substituted service was presented by the appeal. If the rule contended for applies to such an interlocutory

appeal, then the Florida legislature and its Supreme Court did a futile thing in providing a method of appealing from an order of the Circuit Court sustaining service, where the taking of the appeal itself by the party complaining of service alone puts the party in court as effectually as if properly served, and renders the appeal ineffectual for any purpose. We are not prepared to extend the rule in Florida as to the effect as an appearance of the taking of an appeal from a final decree, upon which error based on the insufficiency of service was relied upon with others, to an appeal from an interlocutory order, which involved only the question as to whether the appellant was rightfully in court, as in the Corbett case. Conceding that there is no authority in the practice of Florida for special appeals an appeal from any interlocutory order, questioning the sufficiency of service only, is authorized, and from this it is to be implied that an appellent is to derive some benefit from the appeal, which he could not do if the taking of the appeal constituted a general appearance on his part. It is not reasonably supposable that it was intented that the taking as allowed by the statute, of an appeal from such an order as the one in question, should have the effect of depriving the appellant of the sole benefit sought to be obtained, or obtainable, by a resort to the remedy given. In the absence of authority from the Florida Supreme Court, applying the general rule to the case of such an interlocutory appeal, common sense requires us to decline to make the application. This contention is made by defendant in error though there was a stipulation in the State Court cas
183 that the supersedeas should not constitute a general appearance.

(2) Aside from the question of jurisdiction acquired by service or appearance or both, and the validity of the decree as dependent thereon, is the question of the legal effect of the final decree rendered in the Corbett case.

We think that the decision of this case may be made to depend upon the effect to be given the decree of the Florida Circuit Court as a defence to this suit. It is set up as a defence to a suit by the plaintiff in error to enforce a personal liability against the defendant in error upon a certificate of deposit. If the Florida decree was rendered with jurisdiction over the person of the plaintiff in error, and if its effect was to adjudicate that the defendant in error was not liable to plaintiff in error in a personal action upon the certificate of deposit, it would present a complete defence to the present suit. If either proposition fails to establishment, it presents no defence. We do not think that the Florida decree adjudicated the non-liability of the defendant in error to a personal judgment in favor of a holder of the certificate of deposit. The Supreme Court of Florida in the opinion in the case of Rome Insurance Company vs. Corbett, (based on this same transaction), said of the bill in that case:

"The Bill confines its prayer to an adjudication of the fund sought to be impounded, and does not pray for a general personal decree against these non-residents, and we are not to assume upon the face

of the Bill that the Circuit Court will enter an unauthorized decree, and we have not before us any such question of jurisdiction as was involved in the case of Pennoyer vs. Neff, 95 U. S. 714. * * * We are not to be understood as holding that the Court might not quash a service by publication, if the Bill upon its face showed that it was clearly a common law action, and that the resort to the equity side of the court was a mere subterfuge."

The Supreme Court of Florida construed the bill as asking relief only out of a fund supposed to be in the Jasper Bank, and held that that was the only character of relief that was grantable as against
184 the non-resident defendants upon constructive service. The Court said that it contained no prayer for a general personal decree, and that such a decree would be unauthorized and in conflict with the doctrine of Pennoyer vs. Neff. This was a direction to the lower court to restrict whatever decree it might render against non-residents upon constructive service to an adjudication of their rights in the fund, which was supposed to be in the possession of the defendant in error, the Jasper Bank. The Supreme Court reserved "his right, if not waived, to object should the Court thereafter commit an error against him." The fact that there was no such fund in existence, and that only the personal liability of the defendant in error on the certificate of deposit was in question, is immaterial. The Circuit Court of Hamilton County and the Supreme Court of Florida both entertained the view that the proceeds of the notes discounted, when deposited in the Jasper Bank to the credit of the Trustee of the Rome Insurance Company created a fund, which was evidenced by the certificate of deposit, and which conferred jurisdiction on the Circuit Court over the non-residents, but only to the extent of their interest in the supposed fund. It will be presumed that the subsequent final decree of the Hamilton County Circuit Court was restricted as directed by the Supreme Court. A reference to its terms makes this certain. It adjudged the agreement between Corbett and the Rome Insurance Company and its Trustee for the sale of its capital stock void and of no effect; that the proceeds of the note of Corbett, covered by the certificate of deposit be impressed with a trust in favor of Corbett and be decreed to belong to him; that the Trustee for the Rome Insurance Company be adjudged to have no interest in the proceeds of the note and that defendant in error be required to pay such proceeds to Cor-
185 bett and enjoined from paying them to the Trustee or any one for it; that the certificate of deposit in so far as it covers and includes the proceeds derived from the said note be decreed void and of no effect. It is clear that the decree adjudged only the rights of the non-residents in and to the supposed fund in the Jasper Bank and did not attempt to adjudge that the Jasper Bank was not personally liable to the non-resident holders of the certificates of deposit. Under the doctrine of Pennoyer vs. Neff, recognized and referred to in the opinion of the Supreme Court of Florida, it could not have done so. The decree went as far as it could go, in deny-

ing the non-residents the right to participate in the supposed, but actually non-existent, fund in the Jasper Bank.

The defendant in error set up the decree as a defense to a common law action brought by a non-resident holder of the certificate of deposit against the Jasper Bank, seeking to subject it to a judgment upon the theory of its personal liability by reason of its having executed the certificate of deposit which was in legal effect a due bill and imported the personal liability of the maker, as much as would a promissory note. A decree which had the sole effect of adjudging that the plaintiff had no rights in a special fund, whether existent or not, could not bar the right of the plaintiff to try out in the common law action the personal liability of the bank that issued the certificate. If the Jasper Bank was personally liable to the holder of the certificate, the holder was entitled to pursue it to judgment and collect the judgment out of its assets, other than the fund. The decree was therefore no defence to the action, and this would result even though the Hamilton County Circuit Court had obtained jurisdiction, by service or appearance, to render a personal decree
186 against the non-resident, since the decree actually rendered and here interposed as a defence, is not such a decree.

We think the decree presented no defence to the action (1) because the Florida Court had no jurisdiction to render it as to the non-residents, and (2) because it did not purport to determine the personal liability of the defendant in error to the plaintiff in error on the certificate of deposit. The decree is reversed and the cause remanded for further proceedings in conformity to this opinion.

Reversed.

JACK, *District Judge:*

On the ground that the Circuit Court of Hamilton County, Florida, was without jurisdiction in the Corbett case, I concur in the decree.

(Original filed March 10th, 1920.)

187 *Judgment.*

Extract from the Minutes of March 10th, 1920.

No. 3431.

FIRST NATIONAL BANK OF ROME, GEORGIA,

versus

THE BANK OF JASPER.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Southern District of Florida, and was argued by counsel.

On consideration whereof, It is now here ordered and adjudged by

this Court, that the judgment of the said District Court in this cause, be, and the same is hereby, reversed; and that this cause be, and the same is hereby remanded to the said District Court, for further proceedings in conformity to the opinion of this Court;

It is further ordered and adjudged that the defendant in error, The Bank of Jasper, be condemned to pay the costs of this cause in this Court, for which execution may be issued out of the said District Court.

188 *Clerk's Certificate.*

UNITED STATES OF AMERICA:

United States Circuit Court of Appeals, Fifth Circuit.

I, Frank H. Mortimer, Clerk of the United States Circuit Court of Appeals for the Fifth Circuit, do hereby certify that the pages numbered from 175 to 187 next preceding this certificate contain full, true and complete copies of all the pleadings, record entries and proceedings, including the opinion of the United States Circuit Court of Appeals for the Fifth Circuit, in a certain cause in said Court, numbered 3431, wherein the First National Bank of Rome, Georgia, is plaintiff in error, and The Bank of Jasper is defendant in error, as full, true and complete as the originals of the same now remain in my office.

I further certify that the pages of the printed record numbered from 1 to 174 are identical with the printed record upon which said cause was heard and decided in the said Circuit Court of Appeals.

In testimony whereof I hereunto subscribe my name and affix the seal of the said Circuit Court of Appeals, at my office in the City of New Orleans, Louisiana, in the Fifth Circuit, this 10th day of April, A. D. 1920.

[Seal of the United States Circuit Court of Appeals, Fifth Circuit.]

FRANK H. MORTIMER,
Clerk of the United States Circuit Court of Appeals, Fifth Circuit.

189 In the United States Circuit Court of Appeals, Fifth Circuit.

No. 3431.

FIRST NATIONAL BANK OF ROME, GEORGIA, Plaintiff in Error.

versus

THE BANK OF JASPER, Defendant in Error.

I, Frank H. Mortimer, Clerk of the United States Circuit Court of Appeals for the Fifth Circuit, do hereby certify that the transcript of the record of the proceedings of this Court in the within entitled

case heretofore certified by me for filing in the Supreme Court of the United States was correct and complete as the same then appeared in this Court.

In pursuance of the command of the annexed writ of certiorari, I hereby certify that on the 26th day of October, A. D. 1920, there was filed in my office a stipulation in the above entitled case, in the following words, to-wit:

"In the United States Circuit Court of Appeals in and for the Fifth Circuit.

#3431.

FIRST NATIONAL BANK OF ROME, GEORGIA, Plaintiff in Error,

v.

THE BANK OF JASPER, Defendant in Error.

Stipulation.

Whereas: the United States Supreme Court, by a writ of certiorari issued on the 15th day of October, A. D. 1920, commanded the Judges of the above Court to send to said United States Supreme Court without delay, the record and proceedings in the above entitled cause, and

Whereas: there is now on file and of record in said United States Supreme Court a certified transcript of the record and proceedings in the above entitled cause,

190 Now therefore, it is stipulated and agreed by and between counsel for the respective parties hereto that the said certified copy of the transcript and proceedings of the above cause now on file and of record in the United States Supreme Court may be taken and considered by said United States Supreme Court as a sufficient compliance with and return to said writ.

Dated this 20" day of October, A. D. 1920.

(Signed) W. E. KAY,
J. L. DOGGETT,
HENRY C. CLARK,
Attorneys and of Counsel for The State Bank of Rome, Plaintiff in Error.

(Signed) F. P. FLEMING,
Attorney and of Counsel for The Bank of Jasper, Defendant in Error."

I further certify that the above is a true and correct copy of said stipulation and of the whole thereof.

In testimony whereof, I hereunto subscribe my name and affix the

seal of said United States Circuit Court of Appeals, at the City of New Orleans, Louisiana, this 26th day of October, A. D. 1920.

[Seal of the United States Circuit Court of Appeals, Fifth Circuit.]

FRANK H. MORTIMER,
Clerk of the United States Circuit Court of Appeals for the Fifth Circuit.

191 UNITED STATES OF AMERICA, *ss:*

[Seal of the Supreme Court of the United States.]

The President of the United States of America to the Honorable the Judges of the United States Circuit Court of Appeals for the Fifth Circuit, Greeting:

Being informed that there is now pending before you a suit in which First National Bank of Rome, Georgia, is plaintiff in error, and The Bank of Jasper is defendant in error, No. 3431, which suit was removed into the said Circuit Court of Appeals by virtue of a writ of error to the District Court of the United States for the Southern District of Florida, and we, being willing for certain reasons that the said cause and the record and proceedings therein should be certified by the said Circuit Court of Appeals and removed into
192 the Supreme Court of the United States, do hereby command you that you send without delay to the said Supreme Court, as aforesaid, the record and proceedings in said cause, so that the said Supreme Court may act thereon as of right and according to law ought to be done.

Witness the Honorable Edward D. White, Chief Justice of the United States, the fifteenth day of October, in the year of our Lord one thousand nine hundred and twenty.

JAMES D. MAHER,
Clerk of the Supreme Court of the United States.

193 [Endorsed:] File No. 27740. Supreme Court of the United States, October Term, 1920. No. 383. The Bank of Jasper vs. The First National Bank of Rome, Georgia. Writ of certiorari. 3431. Filed 26 day of October, 1920. Frank H. Mortimer, Clerk of the United States Circuit Court of Appeals.

194 [Endorsed:] 383/27740. No. 3431. United States Circuit Court of Appeals for the Fifth Circuit. First National Bank of Rome, Georgia, plaintiff in error, vs. The Bank of Jasper, defendant in error. Writ of certiorari and return thereto.

195 [Endorsed:] File No. 27740. Supreme Court U. S., October Term, 1920. Term No. 383. The Bank of Jasper, petitioner, vs. First National Bank of Rome, Ga. Writ of certiorari and return. Filed Oct. 29, 1920.

Supreme Court, U. S.
FILED
JUN 7 1920
JAMES D. MAHER,
CLERK

Supreme Court of the United States

October Term 1919

No. 9[redacted]303 76

THE BANK OF JASPER,
a Corporation,
Petitioner,

VERSUS

THE FIRST NATIONAL BANK OF ROME,
a Corporation,
Respondent.

PETITION FOR WRIT OF CERTIORARI AND BRIEF IN SUPPORT THEREOF

F. P. FLEMING,
Attorney and of Counsel for Petitioner.

THE DREW PRESS, JACKSONVILLE 204726

In the Supreme Court of the United States

October Term 1919

THE BANK OF JASPER, a corporation,
Petitioner,

vs.

THE FIRST NATIONAL BANK OF ROME, a corporation,
Respondent.

PETITION FOR WRIT OF CERTIORARI

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

The petition of The Bank of Jasper, a corporation, respectfully shows unto this Honorable Court as follows:

First: This cause involves a conflict between the Supreme Court of the State of Florida and the United States Circuit Court of Appeals in and for the Fifth Circuit.

Second: This cause was instituted against your petitioner in the United States District Court in and for the Southern District of Florida on the 27th day of January A. D. 1913, by the respondent, The First National Bank of Rome, seeking to recover on certain certificates of deposit issued by your petitioner

(Transcript p. 1). The jurisdiction of the trial court was based on diversity of citizenship, (Transcript, p. 3).

Third: Prior to the institution of this action in the United States District Court as aforesaid, on, to-wit, the 3rd day of January, A. D. 1913, there were filed in the Circuit Court, in and for Hamilton County, Florida, a court of general jurisdiction, bills of complaint by C. L. Adams, A. L. Wise, J. B. Wetherington, M. W. O'Cain, J. F. Thaggard, B. F. Carter, and C. W. Smith, in separate suits, against Rome Insurance Company, American Bank and Trust Company, The First National Bank of Rome, (respondent herein), and against your petitioner (Transcript pp. 12, 14, 16, 18, 20, 22 and 24); that in and by said bills of complaint it was prayed that certain certificates of deposit, (being the same certificates of deposit sued on in this cause) be declared to be null and void, and that your petitioner be restrained from paying the proceeds thereof to American Bank and Trust Company or any one for it, (Transcript pp. 12, 14, 16, 18, 20, 22 and 24); that said certificates of deposit (Transcript pp. 9, 10 and 11), are in words and figures as follows, to-wit:

Certificate of Deposit.

No. 315

The Bank of Jasper.

$2,940.00
3,059.38

Jasper, Fla., Nov. 21st, 1911.

American Bank & Trust Co., Trustee, Rome, Ga., has deposited in this Bank Twenty-nine Hundred Forty & No/100 Dollars payable to the

order of itself with interest at rate of 4% compounded quarterly on the return of this Certificate properly endorsed. Not due until November 21st, 1912.

W. S. MURROW, Cashier.

Not subject to check.
Copy.

Certificate of Deposit.

No. 316.

The Bank of Jasper.

Jasper, Fla., Nov. 22, 1911

$441.00
458.00

American Bank & Trust Co., Trustee, of Rome, Ga., has deposited in this Bank Four Hundred Forty-one and NO/100 Dollars payable to the order of itself with interest at rate of 4% per annum compounded quarterly on the return of this Certificate properly endorsed. On or after November 22nd, 1912.

"W. S. MURROW, Cashier.

Not subject to check.
Copy."

"Certificate of Deposit.

"No. 317

"The Bank of Jasper

$1,470.00
1,529.69

Jasper, Fla., Nov. 23rd, 1911.

"American Bank & Trust Co., Trustee, of Rome, Ga., has deposited in this Bank Fourteen Hundred and Seventy and No/100 Dollars pay-

able to the order of itself with interest at 4% per annum compounded quarterly on the return of this Certificate properly endorsed on or after November 23rd, 1912.
Not subject to check.

"W. S. MURROW, Cashier.

"Copy.

"Certificate of Deposit.

"No. 318

"The Bank of Jasper

$735.00
764.84

Jasper, Fla., Nov. 23, 1911.

"American Bank & Trust Co., Trustee, of Rome, Ga., has deposited in this Bank Seven Hundred Thirty-five and No/100 Dollars payable to the order of itself with interest at the rate of 4% per annum compounded quarterly on the return of the Certificate properly endorsed on or after Nov. 23rd, 1912.

"W. S. MURROW, Cashier

"Not subject to check.
Copy.

"Certificate of Deposit.

No. 319.

"The Bank of Jasper

$1,558.20
1,621.46

Jasper, Fla., Nov. 25th, 1911.

"American Bank & Trust Co., Trustee of Rome, Ga., has deposited in this Bank Fifteen

Hundred Fifty-eight and 20/100 Dollars payable to the order of itself with interest at the rate of 4% per annum compounded quarterly on the return of this Certificate properly endorsed, on or after Nov. 25th, 1912.

W. S. MURROW, Cashier.

"Not subject to check.

Copy.

That in said suits in the said Circuit Court in and for Hamilton County, Florida, service of process was had upon The First National Bank of Rome, (the original plaintiff herein) by publication, under the provisions of Section 1866, General Statutes of Florida (Transcript pp. 27 to 63); that your petitioner, a resident of the State of Florida, was personally served with process.

That upon the return day fixed in the order of publication by process, The First National Bank of Rome (original plaintiff here) filed special appearances and motions to quash the service, (Transcript pp. 27 to 63) which motions were in substance confined to the one ground that the proceedings brought in the state court were actions *in personam* and that there had been no personal service on said The First National Bank of Rome. These motions having come on to be heard before the Circuit Court of Hamilton County, Florida, said court on the 3rd day of April, A. D. 1913, did deny said motions (Transcript p. 95).

Thereupon, on the 10th day of April, A. D. 1913, stipulations were entered into between solicitors for the respective parties in the suits in the State courts, (Transcript p. 80), providing that all proceedings in said suits be stayed pending the prosecution of an appeal to the Supreme Court of Florida in the case of B. F. Carter vs. Rome Insurance Company, et als., which appeal was from orders of the State court denying similar motions to quash services by publication on similar grounds, and which appeal under the decisions of the Supreme Court of Florida constituted a general appearance by the appellant The First National Bank of Rome; and it was further provided in and by said stipulation (Transcript p. 80) that the ultimate decision of the said appeal in said case of B. F. Carter vs. Rome Insurance Company, et als., would be decisive of the validity of the service by publication on the defendants in those suits.

That at the June term of the Supreme Court of Florida, said Supreme Court affirmed the order of the lower court in the case of B. F. Carter vs. Rome Insurance Company et als., (Transcript p. 121), in words and figures as follows, to-wit:

"In the Supreme Court of Florida,
June Term, A. D. 1913.

"Rome Insurance Company, a Georgia Corporation, and
Others, Appellants,
vs.
B. F. Carter, Appellee.
Hamilton County.

"Per CURIAM.

"This case cannot be distinguished from

that of Rome Insurance Company, vs. J. H. Corbett, this day decided, and upon the opinion therein, the order herein appealed from is affirmed.

"All Concur."

That the decision of the Supreme Court of the State of Florida in Rome Insurance Company, et als. vs. J. H. Corbett, on the authority of which said case of Rome Insurance Company et. als. vs. B. F. Carter was decided, is in words and figures as follows: (Transcript pp. 122 and 123).

"In the Supreme Court of Florida,
June Term, A. D. 1913.

"Rome Insurance Company, a Georgia Corporation, and
Others, Appellants,
vs
J. H. Corbett, Appellee.
Hamilton County.

COCKRELL, J:

"A bill was filed in the Circuit Court for Hamilton County against local defendants and also certain non-residents corporations seeking to impound a fund in that county arising out of an alleged fraudulent transaction consummated in that County. Constructive service, in perfect accordance with the Statute was had by publication, and the non-residents corporations appeared specially to quash the service upon the theory that the sole relief prayed was in personam, and that therefore the statute authorizing constructive service by publication does not apply. This motion having been denied these non-residents have sued out what they term a special appeal.

"It may well be that this appeal so operates as a general appearance in the Circuit Court, as to render the question before us a moot one, but the Appellee does not ask us to so hold, and it appears that this is but a test case, upon the decision of which many other cases in that Court are depending.

"The Bill confined its prayer to an adjudication of the funds sought to be impounded, and does not pray for a general personal decree against these non-residents and we are not to assume upon the face of the bill that the Circuit Court will enter an unauthorized decree; and we have not before us any such question of jurisdiction as was involved in the case of Pennoyer v. Neff, 95 U. S., 714.

"The purpose of the statute authorizing constructive service by publication is to notify non-residents of the pending suit so that they may if they care to do so, come into the case and if the statute be followed, there is no right in the non-resident to quash this notice; he has his right if not waived to object should the Court thereafter commit an error against him.

"Our constructive service statute is broad enough to apply to any suit in equity pending in our Circuit Court and as has been said in Kilpatrick v. Post, 53 N. J. Eq., 591 text 597 32 Atl. Rep. 267, cannot be confined in its operation to the cases where the Court might make final decree or judgment. Further that Court says: 'It was not intended, that the question of the power to enter the ultimate decree or judgment should enter into the question of the right to give notice of the suit to a non-resident, or that this question of jurisdiction should be settled on a motion to discharge the order of publication. The Complainant is entitled to

have the question of jurisdiction settled by a final decree.'

"We are not to be understood as holding that the Court might not quash a service by publication, if the bill upon its face showed that it was clearly a common law cause of action, and that the resort to the equity side of the Court was a subterfuge; the bill before us does not present that case.

"The Order is affirmed:

"Shackleford, C. J. and Taylor, Hocker and Whitfield, J. J. concur."

That thereafter, The First National Bank of Rome took no further part in the proceedings in the State Court (Transcript pp. 27 to 63) and on the 14th day of July A. D. 1914, final decrees were entered in the state court (Transcript pp. 27 to 63), which decrees adjudged that the certificates of deposit therein mentioned, (*being the same certificates of deposit herein sued upon*) were void and of no effect and enjoining your petitioner from paying the proceeds thereof to The First National Bank of Rome, or to any one for it.

Fourth: That on the 3rd day of August, A. D. 1914, in this suit instituted in the United States District Court in and for the Southern District of Florida by the respondent herein, The First National Bank of Rome against your petitioner, your petitioner did file pleas of *res adjudicata*, (Transcript pp. 12 to 27), setting up the decrees entered in the Circuit Court in and for Hamilton County, Florida, which decrees adjudged the certificates of deposit herein

sued upon to be void and of no effect, and which enjoined your petitioner from paying the proceeds thereof to the plaintiff below or to anyone for it. Certified copies of said decrees were attached to said pleas (Transcript pp. 27 to 63).

Fifth: That on the 7th day of September, A. D. 1914 the plaintiff in the trial court, (the respondent here), filed a demurrer to said pleas, (Transcript pp. 61 to 63), which said demurrer coming on to be heard before the District Judge of said Court, was on the 12th day of January, A. D. 1915, overruled, (Transcript p. 64).

Sixth: That thereafter, on the 15th day of June, A. D. 1915, said respondent filed replications to said pleas, (Transcript pp. 66 to 76), setting up in substance by said replications that the chancery suits mentioned in your petitioner's pleas, and which are fully described in the third paragraph of this petition, were actions *in personam;* that no personal service was ever had on said respondent; that it did not at any time or in any manner appear in said suits, except specially to contest the service by publication therein made, and that it in no way waived the want of jurisdiction of the State Court over its person; there were attached to said replications copies of the records in the said Chancery suits mentioned, (Transcript pp. 77 to 147).

Seventh: That on the 5th day of July, A. D. 1915, your petitioner filed a motion to strike (Transcript pp. 147 and 148) and a demurrer, (Transcript pp. 148 to 149) to said replications which said motion and

demurrer coming on to be heard by the Court, the said demurrer was, on the 2nd day of February, A. D. 1917, sustained as to each of said replications, (Transcript p. 155).

Eighth: That on the ninth day of January, A. D. 1919, the plaintiff in the trial court filed a declination to plead further (Transcript p. 157). Thereupon, on the 9th day of January, A. D. 1919, final judgment was entered in favor of your petitioner. (Transcript pp. 158 and 159).

Ninth: That from said judgment, said plaintiff sued out a writ of error to the Circuit Court of Appeals of the United States for the Fifth Circuit which Court on the 10th day of March, A. D. 1920, reversed the judgment of the District Court. (Transcript p. 187) holding in effect:

(a) That the Circuit Court in and for Hamilton County, Florida, acquired no jurisdiction over the person of the respondent, The First National Bank of Rome, by the service by publication made in said suits.

(b) That said Circuit Court in and for Hamilton County, Florida, acquired no jurisdiction over the fund or *res* sought to be impounded in said chancery suits, as the same was not under the control of the Court.

(c) That the Florida Court had no jurisdiction to render the said decrees as to non-residents.

(d) That the said court did not purport to determine the personal liability of your petitioner to the plaintiff on the said certificates of deposit.

(e) That the prosecution of the appeals by respondent to the Florida Supreme Court, did not amount to general appearances in the State of Florida, (which holding is in conflict with the decisions of the Supreme Court of Florida).

Tenth: That a certified copy of the entire record in this cause in the Circuit Court of Appeals of the United States for the Fifth Circuit is hereby furnished, and filed herewith and reference thereto is hereby made, all in compliance with Rule 37 of this Honorable Court.

Eleventh: Your petitioner is advised and believes that the aforesaid judgment of the United States Circuit Court of Appeals for the Fifth Circuit is erroneous, and that this Honorable Court should require the said case to be certified to it for its review and determination, in conformity with the provisions of the Act of Congress in such case made and provided, said case being made final in said United States Circuit Court of Appeals by the provisions contained in Section 128 of the United States Judicial Code.

Twelfth: Your petitioner further represents unto this Honorable Court that the aforesaid judgment of the United States Circuit Court of Appeals for the Fifth Circuit presents a conflict of State and Federal jurisdiction and in effect reverses the decisions of the Supreme Court of the State of Florida in the cases of Rome Insurance Company, et als. v. B. F. Carter (63 Sou. 834; Transcript p. 121) and Rome Insurance Company et als. v. J. H. Corbett,

(63 Sou. 833; Transcript pp. 122 and 123) and denies them full faith and credit, for the following reasons:

(a) The United States Circuit Court of Appeals held that the prosecutions of the appeals in the State Court did not amount to general appearances, whereas, the Florida Supreme Court, following the established rule of practice in that State, held that the prosecution of an appeal constitutes a general appearance in the lower court.

(b) The Florida Supreme Court held that the service of publication upon the respondent, The First National Bank of Rome, original plaintiff in this action, was valid so as to bring its person within the jurisdiction of the court for the relief prayed in the bills of complaint. The Circuit Court of Appeals held otherwise.

(c) The Florida Supreme Court held that the bills of complaint confined their prayers to an adjudication of a fund sought to be impounded, and that said fund was within the jurisdiction and control of the State Court.

Thirteenth: Your petitioner further represents that said judgment of the United States Circuit Court of Appeals for the Fifth Circuit is erroneous on the following grounds:

(a) The fund impounded by the decree in the State Court had its *situs* in the State of Florida, and not in the State of Georgia; because:

(aa) The money was not to be payable ex-

cept "on the return of this certificate properly endorsed."

(bb) The certificate was not subject to check.

(cc) The deposit was made for a specific purpose and was not the part of a general fund.

(dd) The *situs* of a debt, for the purpose of administration, is the home of the debtor.

(b) The proceedings in the State Court, the decrees in which were set up as a defense by your petitioner in the District Court, were proceedings *in rem*, to the validity of which personal service is unnecessary.

(c) If any defects existed in the State Court's jurisdiction over The First National Bank of Rome, such defects under the rulings of the Supreme Court of Florida were waived by the prosecution of the appeals to the Florida Supreme Court.

(d) The decrees relied upon declared the certificates of deposit herein sued upon to be void and of no effect.

Fourteenth: Your petitioner further represents that no question was raised by the plaintiff, either in the District Court or in the Circuit Court of Appeals as to the sufficiency of your petitioner's pleas of *res adjudicata*, except that the proceedings in the State court were actions *in personam* and that no

personal service was had on the plaintiff, one of the defendants in those proceedings.

Fifteenth: Your petitioner further represents that the said United States Circuit Court of Appeals for the Fifth Circuit, in denying to your petitioner the benefit of the adjudication of the Supreme Court of Florida of a statute of that state, assumed a jurisdiction which not even the Supreme Court of the United States has power to assume.

WHEREFORE, your petitioner respectfully prays that a writ of certiorari may be issued out of, and under the seal of, this Court, directed to the United States Circuit Court of Appeals, in and for the Fifth Circuit, commanding the said court to certify and send to this Court, on a day certain therein to be designated, a full and complete transcript of the record and all proceedings of the said Circuit Court of Appeals in the said case entitled "The First National Bank of Rome a corporation, plaintiff in error, versus The Bank of Jasper a corporation, defendant in error, Number 3431," to the end that the said case may be reviewed and determined by this Court, as provided in and by Section 240 of the United States Judicial Code, or that your petitioner may have such other or further relief or remedy in the premises as to this Court may seem appropriate and in conformity with said povision of the Judicial Code, and that the said judgment of said Circuit Court of Appeals in said case, and every

part thereof, may be reversed by this Honorable Court.

And your petitioner will ever pray, etc.

F. P. FLEMING,
Attorney and of Counsel for Petitioner.

I, F. P. Fleming, attorney and of counsel for petitioner, do hereby certify that in my opinion the foregoing petition is well founded in law and proper to be granted.

F. P. FLEMING.

In the Supreme Court of the United States

THE BANK OF JASPER, a corporation,
Petitioner,

vs.

THE FIRST NATIONAL BANK OF ROME, a corporation,
Respondent.

BRIEF FOR PETITIONER.

The foregoing petition presents a clear case of conflict between a State Court and a United States Circuit Court of Appeals, and for that reason the writ of certiorari should be granted.

While we realize that the granting of such a writ is purely within the discretion of the Court and that such discretion is sparingly exercised, yet the fact that the decisions of a State and a Federal Court are in conflict *in the same controversy,* is considered sufficient grounds for the issuance of the writ.

Forsyth v. Hammond, 166 U. S., 506, 17 Sup. Ct. Rep. 665, 41 L. Ed. 1095.

In the case just cited it was said, referring to the power to issue writs of certiorari:

> "It is a power which will be sparingly exercised, and only when the circumstances of the case satisfy us that the importance of the ques-

> tion involved, *the necessity of avoiding conflict between two or more courts of appeal, or between courts of appeal and the courts of a state*, or some matter affecting the interests of this nation in its internal or external relations, *demands such exercise.*" (Italics ours).

In that case, as here, there existed a conflict between the decision of a Circuit Court of Appeals and the Supreme Court of a State. In that case, as here, the Circuit Court of Appeals reversed the lower court and sent the case back for further proceedings. It was argued that as the decision in the Circuit Court of Appeals was not final the petition for writ of certiorari was premature, but after referring to the conflict between the State and Federal Courts, it was said:

> "Although no final decree had been entered, it seemed to us a duty to bring the case and the question here for examination at the earliest possible moment."

The conflict in the present case is glaring. The Circuit Court of Appeals held that the appeals prosecuted in the suits in the State Court by the respondent, did not constitute general appearances. This was decided in the very face of the decision of the Florida Supreme Court in the very suit under consideration holding otherwise, and in the face of the established rule in Florida that an appeal constitutes a general appearance, notwithstanding that the appeal may have been for the sole purpose of testing the sufficiency of the service.

In its opinion, the Court of Appeals admitted the Florida rule (Transcript, page 181) but held that

in the proceedings in question, the rule did not operate because the appeals were not from *final*, but from interlocutory decrees.

But in those same proceedings, the Florida Supreme Court held that the appeals from the interlocutory decrees *did* constitute general appearances (Transcript p. 122). The only reason the Florida Court did not base its decision on that ground was because, as stated in the opinion (page 122) it was specially requested to pass on the merits so that many other cases pending in the lower court could thus be disposed of on its authority.

The conflict also appears in that the Florida Court held that the proceedings in the State Court were proceedings *in rem*, to the validity of which personal service was unnecessary, whereas the Court of Appeals held that the *same proceedings* were proceedings *in personam* to the validity of which personal service was essential.

We respectfully submit, that in deciding contrary to the holding of the Florida Supreme Court, the Circuit Court of Appeals committed error, because:

A. Federal Courts must recognize and apply rules of State Courts concerning matters of procedure.

B. In Florida, the prosecutions of appeals constitute general appearances.

C. The proceedings in the State Court were proceedings *in rem*, and personal service was unnecessary.

D. The decrees entered in the State Court constituted a complete defense to this action brought in the Federal Court.

A — FEDERAL COURTS MUST RECOGNIZE AND APPLY RULES OF STATE COURTS CONCERNING MATTERS OF PROCEDURE.

In considering the legality and effect of proceedings in State Courts, Federal Courts are not to be governed by their own rule of procedure, or by the general rule in other jurisdictions, but must apply and be governed by the rules of procedure of the State in which the proceedings were brought. It is an elementary proposition that matter of procedure is governed by the *lex fori*.

In York v. Texas, 137 U. S. 15, 34 L. Ed. 604, this principle was clearly recognized. The facts of the case, as well as the holding of the Court, appear in the following excerpt from the opinion:

> "It was conceded by the district and supreme courts that the service upon the defendant in St. Louis was a nullity, and gave the district court no jurisdiction; but it was held that, under the peculiar statutes of the State of Texas, the appearance for the purpose of pleading to the jurisdiction was a voluntary appearance, which brought the defendant into court. Plaintiff in error questions this construction of the Texas statutes, but inasmuch as the supreme court, the highest court of the State, has so construed them, such construction must be accepted here as correct, and the only question we can consider is as to the power of the State in respect thereto."

The York case has been followed and the rule approved and applied in the following decisions:

> Missouri etc. Ry. v. Goodrich, 234 U. S. 1429; 58 L. Ed. 1578.

Missouri etc. Ry. v. Goodrich, 229 U. S. 607; 57 L. Ed. 1349.

Kauffman v. Wooters, 138 U. S. 287; 34 L. Ed. 962.

McLaughlin Brothers, v. Hallowell, 228 U. S. 289; 57 L. Ed. 840.

Western Ind. Co. v. Rupp, 235 U. S. 261, 59 L. Ed. 220.

In the last cited case it was said:

> "That a state, without violence to the 'due process' clause of the 14th Amendment, may declare that one who voluntarily enters one of its courts to contest any question in an action there pending shall be deemed to have submitted himself to the jurisdiction of the court for all purposes of the action, and may attach consequences of this character even to a special appearance entered for the purpose of objecting that the trial court has not acquired jurisdiction over the person of the defendant, is settled by the decision of this court in York v. Texas, 137 U. S. 15, 34 L. Ed. 604, 11 Sup. Ct. Rep. 9; followed in Kauffman v. Wooters, 138 U. S. 285, 34 L. Ed. 962, 11 Sup. St. Rep. 298."

Elaborating on the principles underlying this rule, the opinion continues:

> "The 14th Amendment declares that no state shall 'deprive any person of life, liberty, or property without due process of law.' This prohibition has regard not to matters of form, but to substance of right. Since its adoption,

> whatever was the rule before, a non-resident party against whom a personal action is instituted in a state court without service of process upon him may, if he please, ignore the proceeding as wholly ineffective, and set up its invalidity if and when an attempt is made to take his property thereunder, or when he is sued upon it in the same or another jurisdiction. Pennoyer v. Neff 95 U. S. 714, 732, 733, 24 L. Ed. 565, 572; York v. Texas, 137 U. S. 15, 21, 34 L. Ed. 604, 605, 11 Sup. Ct. Rep. 9. But if he desires to raise the question of the validity of the proceeding in the court in which it is instituted, so as to avoid even the semblance of a judgment against him, it is within the power of the state to declare that he shall do this subject to the risk of being obliged to submit to the jurisdiction of the court to hear and determine the merits, if the objection raised to its jurisdiction over his person shall be overruled. This prevents a defendant from doing what plaintiff in error has attempted to do in the present case; that is, to secure, if possible, the benefit of a binding adjudication in its favor upon the merits, through the exercise of the court's jurisdiction, while depriving its adversary of any possibility of success by reserving an objection to the jurisdiction of the court to render any judgment against it."

The identical situation presented by the record herein existed in the case of Foster Milburn Co. v. Chinn (C. C. A. 2nd Circuit) 202 Fed. 175, where the Court said:

> "It is certainly the general rule of the federal courts that an objection once taken to the jurisdiction is not waived by the defendant's subsequently answering and taking part in the trial. Harkness v. Hyde, 98 U. S. 476, 25 L. Ed. 237. It is also true that the defendant may attack a

judgment of the court of another state for lack of jurisdiction, either appearing on the face of the record or proved by testimony. Thompson v. Whitman, 18 Wall, 457, 21 L. Ed. 897. It is, however, the law of the state of Kentucky, that though the defendant appear specially to object to the jurisdiction of the court, if he thereafter appeal to a higher court from any judgment recovered against him in the action, he ipso facto waives his objection and transforms his special into a general appearance. It is not necessary for us to determine whether the service of process upon Monroe, as managing agent, was good or bad. We are obliged under section 905, U. S. Rev. St. (U. S. Compt. St. 1901, p. 677), to give full faith and credit to the judgment; that is to say, the same faith and credit it would have 'by law or usage' in the state of Kentucky. So doing, we must treat the defendant as having appeared generally. The trial judge was right in holding that a usage established by the decision of the highest courts of Kentucky is to be given the same effect as if established by statute. In the latter case the Supreme Court has held that such a rule is binding in a suit upon a judgment in the courts of another state. York v. Texas, 137 U. S. 15, 11 Sup. Ct. 9, 34 L. Ed. 604."

B — IN FLORIDA, THE PROSECUTIONS OF APPEALS CONSTITUTE GENERAL APPEARANCES.

In determining, then, the legality of the proceedings in the State Court, the Circuit Court of Appeals erred in not giving full faith and credit to the judgment of the Florida Supreme Court, which considered that the appeal waived the objections to the service. The rule in Florida is well settled that the prosecution of an appeal constitutes a general appearance, and the Circuit Court of Appeals should have applied this rule.

The Florida rule is stated and applied in the following decisions:

Standley v. Arnow, 13 Fla. 361.

Henry v. Spitler, 67 Fla. 146, 64 So. 745.

Busard v. Hutson, 65 Fla. 479, 62 So. 483.

Barnick v. Rouse, 53 Fla. 643, 43 So. 753.

Hayman v. Neil, 53 Fla. 127, 44 So. 176.

Rumeli v. Tampa, 48 Fla. 112, 37 So. 563.

Wylly v. Sanford, L. & T. Co. 44 Fla. 818, 33 So. 453.

Schrader v. Schrader, 36 Fla. 502.

Rome Ins. Co. v. Corbett, Transcript herein p. 76.

The Circuit Court of Appeals in its decision (Transcript p. 181) stated that "The rule in Florida, differing from that which obtains in the Federal Courts, is to the effect that an appellant, though objecting to the insufficiency of service successfully, is considered in Court upon the return of the case to the lower court." On the same page of its opinion the Court of Appeals conceded that "this court will follow the rule of decision in the State Court in passing upon a judgment in that Court."

But the Circuit Court of Appeals failed to follow the State rule of decision on the ground that it was not applicable to an appeal from an interlocutory order of the Court, as distinguished from a final decree. Such a distinction is not made by the Florida Courts. It was made only by the United States Circuit Court of Appeals, which applied *its own rule of decision* instead of that of the Florida Court.

The Supreme Court of Florida indicated very plainly that the rule was applicable in the *same proceedings* considered by the Court of Appeals. And in the case of Rumeli v. Tampa, 48 Fla. 112, 37 So. 563, it appeared that the appeal was from an interlocutory appeal, the only decree mentioned in the opinion of the Court or the statement of facts being a decree pro confesso.

The Circuit Court of Appeals, having granted the correctness of the rule contended for, can not *assume* exceptions to it. The presumption is that the rule applies to all classes of appeals, unless proved otherwise.

West. Ind. Co. v. Rupp, 235 U. S. 261, 59 L. Ed. 220; 225.

Not only is there no basis for the distinction in the Florida decisions, but on the contrary, the rule is applied, as shown by the cases cited, to appeals from final decrees, or from interlocutory orders.

The reason underlying the rule is the same, regardless of the nature of the order appealed from. It is, of course, that any one who so far submits himself to the jurisdiction of the courts of a state as to avail himself of the machinery of the courts to prosecute an appeal, is "in court" and he can not claim at the same time, to be "out of court," by any fiction of special appearance, or so-called "special appeal." It is not the nature of the decree appealed from that determines the fact of appearance, but the fact of *voluntarily taking an appeal.*

Respondent claimed that the appeal in the state court was not "voluntary," but *it failed utterly to show any compulsion of any sort requiring it to resort to appellate procedure.* If it was convinced of the illegality of the service, it could have ignored the proceedings entirely as wholly ineffective, and could have set up its invalidity if and when an attempt was made to take its property thereunder.

> West Ind. Co. v. Rupp, 225 U. S. 261, 59 L. Ed. 220.
>
> Pennoyer v. Neff, 95 U. S. 732, 24 L. Ed. 522.
>
> York v. Texas, 137 U. S. 15, 34 L. Ed. 604.

Had no appeal been taken, the question could very well have been raised in this suit in the District Court. But having appealed, *voluntarily*, in the State Court,

respondent waived its objection to the jurisdiction over its person under the undoubted Florida rule.

The reason and the justice of the rule is this: it prevents a defendant from doing what respondent has attempted to do in this case, that is, to secure, if possible, the benefit of a binding adjudication in its favor, *through the exercise of the court's jurisdiction;* and at the same time to deprive its adversary of any possibility of success by reserving an objection that the Court had no jurisdiction to render any judgment against it.

> West Ind. Co. v. Rudd 235 U. S. 261, 59 L. Ed. 220; 225.

These reasons underlying the Florida rule apply regardless of the nature of the decree appealed from, and the Court of Appeals erred in failing to apply it to the proceedings under consideration.

C — THE PROCEEDINGS IN THE STATE COURT WERE PROCEEDINGS IN REM, TO THE VALIDITY OF WHICH PERSONAL SERVICE WAS UNNECESSARY.

In the foregoing pages of this brief we have shown that under the established rule in Florida, the respondent by appealing in the proceedings in the State Court, submitted itself to the jurisdiction of the Court and in effect entered a general appearance. Therefore the respondent was properly before the State Court for the entry of even personal decrees against it.

Even aside from this consideration however, the decrees in the State Court are binding and valid, because they are decrees *in rem*, entered in proceedings *in rem*, and to the validity of which personal service of process, or jurisdiction over the person is unnecessary. All that is essential is that there be a thing, *a res*, property of the defendant, within the Court's jurisdiction.

Here again the Court of Appeals decided contrary to the Supreme Court of the State of Florida. The former held that the proceedings in the State Court were not proceedings *in rem*, because there was no *res* in the control of the State Court, (Transcript p. 180). The Florida Supreme Court held that the proceedings were *in rem*, the bill not praying for a personal decree against the non-residents, but confining its prayer to an adjudication of the funds sought to be impounded, (Transcript, p. 122).

The Circuit Court of Appeals, we contend, is in error in considering the proceedings as actions *in personam*. The decrees in the State Court merely

determined the rights of the parties to the *res* in the jurisdiction of the Court. This *res* was the *indebtedness*, or the supposed indebtedness of petitioner, on the certificates of deposit. These certificates represented a fund in the hands of the petitioner, The Bank of Jasper, a resident corporation.

The Court of Appeals considered the fund as a part of a *general* deposit, and that there was therefore no specific fund over which the Court could exercise control. An examination of the certificates of deposit (Transcript pp. 9, 10 and 11) reveals that they did represent a special fund, or deposit, because they "were not subject to check" and because they were not payable except "on the return of this certificate properly endorsed." The fact that the certificates were in the State of Georgia is immaterial. They were merely the evidence of the deposits, which were in the Jasper Bank. These deposits consisted of the proceeds of promissory notes given by the complainants in the suits in the State Court to respondent and by it endorsed to the petitioner.

But even granting for the sake of argument, that there were no specific funds that could be identified, the *res* still existed. It was the *indebtedness* of the Bank of Jasper, created by the certificate of deposit, and the only purpose of the suits and the only effect of the decrees, was to adjudicate the rights of the parties to that indebtedness.

The Circuit Court of Appeals proceeded upon the theory that there can be no action *in rem* unless there be a *res* in the form of a *tangible* thing. But a *res* may as well be intangible as tangible. It is well settled that a *debt* is a *res* and that its situs is the home of the debtor, where it may be adminis-

tered through actions *in rem*. It is only on the recognition of this principle that garnishment proceedings can be justified. The debtor, The Bank of Jasper, being in the jurisdiction of the State Court, the debt, the *res*, was also in the Court's jurisdiction.

In Bristol v Brent, 30 Utah 108, 21 Ann. Cases 1125, it is said:

> "A proceeding by which jurisdiction is sought by attaching property, whether tangible or intangible, such as a debt, is essentially a proceeding *in rem;* that is, a proceeding against a *rem* which is brought into the custody of the law and hence within the jurisdiction of the Court."

The foregoing citation is presented to show a debt is considered as a *res*, sufficient to support a proceeding *in rem*.

This same principle is illustrated by the following quotation from 12 R. C. L. 777:

> "When the jurisdiction of the Court is based on the attachment of property, such as a debt, and not on the residence of the parties proceeded against, the action is essentially a proceeding *in rem*. For example, an action in one state by a resident thereof against a resident of another state to recover an indebtedness, in which garnishment proceedings are instituted against a foreign corporation doing business in both states, the principal debtor being served by publication, is an action *in rem*, the *res* being the indebtedness due from the corporation to the defendant."

And in 5 R. C. L. at page 930, it is said:

> "The general rule of law is well settled, that for the purpose of founding administration, all simple contract debts are assets at the domicil of the debtor. *And the locality of such a debt for this purpose is not affected by a bill of exchange or promissory note having been given for it, because the bill or note does not alter the nature of the debt, but is merely evidence of it, and likewise it is held in the case of a note that the property has its situs in the place in which the maker resides and not where the note is held.*" (Italics ours.)

The above language is taken almost verbatim from the opinion of this Court in Wyman v. U. S. 109 U. S. 654, 27 L. Ed. 1068.

That a debt is a *res* is further evidenced by the following language used by the court in the case of Swedish American Bank v. Bleeker, 72 Minn. 383, 75 N. W. 740, 42 L. R. A. 283:

> "This is a proceeding *in rem*. Aultman v. Markley, 61 Minn. 404. The *res* is the indebtedness due from the garnishees to the defendant."

The Supreme Court of the United States has also held that a debt is a *res*, the situs of which is the domicil of the debtor. See C. R. I. & P. R. Co. v. Sturm, 174 U. S. 810; 43 L. Ed. 1144, where it was said:

> "The idea of locality of things which may be said to be intangible is somewhat confusing, but if it be kept up the right of the creditor and the obligation of the debtor cannot have the

same, unless debtor and creditor live in the same place. But we do not think it is necessary to resort to the idea at all or to give it important distinction. The essential service of foreign attachment laws is to reach and arrest the payment of what is due and might be paid to a non-resident to the defeat of his creditor. To do it you must go to the domicil of his debtor and can only do it under the laws and procedure in force there. This is a legal necessity, and considerations of situs are somewhat artificial. If not artificial, whatever of substance there is must be with the debtor. He and he only has something in his hands. That something is the *res*, and gives character to the action as one in the nature of a proceeding *in rem*. Mooney v. Buford & George Mfg. Co. (34 U. S. App. 581), 72 Fed. Rep. 32; Conflict of Laws, sec. 549, and notes.

"To ignore this is to give immunity to debts owed to non-resident creditors from attachment by their creditors, and to deny necessary remedies. A debt may be as valuable as tangible things. It is not capable of manual seizure, as they are, but no more than they can it be appropriated by attachment without process and the power to execute the process. A notice to the debtor must be given, and can only be given and enforced where he is. This, as we have already said, is a necessity, and it cannot be evaded by the insistence upon fictions or refinements about situs or the rights of the creditor. Of course, the debt is the property of the creditor, and because it is, the law seeks to subject it, as it does other property, to the payment of his creditors. If it can be done in any other way than by process against and jurisdiction of his debtor, that way does not occur to us."

Since, therefore, the law is settled that a debt is a *res*, the situs of which is the domicil of the debtor, if cannot be contended that in the suits in the State courts there was no *res* on which to operate. The debt was the *res*, the debt owing to the plaintiff here by this defendant, Jasper Bank, and the situs of the debt was Hamilton County, Florida the domicil of the debtor. However, as we have seen, the notes, the specific securities and assets represented by the certificates of deposit were also in the custody of the Jasper Bank and within the State court's undoubted jurisdiction.

This indebtedness the Court adjudicated and enjoined your petitioner from paying it to the respondent or any one for it.

The holding in C. R. I. & P. R. R. Co. v. Sturm, 174 U. S. 710, 43 L. Ed. 1144, was followed in New York Life Ins. Co. v. Dunlevy, 241 U. S. 521, 60 L. Ed. 1142 where it was held that a State Court could, on garnishment by an execution creditor, require the amount due a non-resident to be determined, and appropriate it to the payment of the judgment, although the non-resident creditor was not in Court.

In Rothschild v. Knight, 184 U. S. 341, 46 L. Ed. 580, 22 Sup. Ct. 393, it was held that an insolvent's assignee may seize by trustee process a debt due a non-resident defendant, which is alleged to be a fraudulent preference.

This principle was again stated in King v. Cross, 175 U. S. 399, 20 Sup. Ct. 132, 44 L. Ed. 213, which held:

> "A garnishment of a resident debtor to reach a debt due to a non-resident defendant

> *who has no property subject to the jurisdiction of the Court*, does not deprive him of property without due process of law." (Italics ours.)

In the light of the foregoing decisions there can be no question but that the Circuit Court of Appeals erred when it decided (Transcript p. 180):

> "There being no *res* in the control of the Circuit Court of Hamilton County, jurisdiction was not conferred on that court over non-resident defendants by substituted or constructive service."

There *was* a *res*, and it was in the control of the Court. The deposits, the original notes for which the certificates had been issued, were still unpaid and in the possession of The Bank of Jasper, in Florida. They in themselves constituted the *res*. But in addition, there was the *indebtedness* owing by the Jasper bank to the respondent. As the Circuit Court of Appeals said in its opinion (Transcript, p. 185), the certificate of deposit created the same liability on the maker as imported by a promissory note. It was on this indebtedness which the Circuit Court admitted existed, that the jurisdiction of the State Court was based.

The proceedings were not strictly garnishments, but they were analogous thereto. The debtor was within the control and jurisdiction of the Court. A dispute arose as to how the indebtedness should be administered. The complainants in the State Court claimed that the debt should be paid to them, instead of to respondent. This is essentially the theory of garnishment. The situs of the debt being at the

home of the debtor, as held in the cases cited *supra*, that is, in Hamilton County, Florida, the Circuit Court of that county had jurisdiction to administer the rights and claims thereto without obtaining personal service on the non-resident creditor.

The proceedings, while not strictly *in rem*, which are proceedings directly against property itself, are yet actions *in rem* in the broader and more general sense, which includes actions where no preliminary seizure is made, but the purpose of which is solely to try the right of title to property or indebtedness within the Court's jurisdiction. This class of actions is often designated as proceedings *quasi in rem*, but they partake of all the characteristics of, and are really, actions *in rem*.

> Pennoyer v. Neff 95 U. S. 714, 24 L. Ed. 565.
>
> Freeman v. Alderson, 119 U. S. 185, 30 L. Ed. 373.
>
> 1 Ruling Case Law 328.

Aside from the fact that the proceedings in the State Court were proceedings *in rem*, and jurisdiction of the person of non-resident defendants was unnecessary, there is the further consideration, already pointed out, that in the suits in question, the Court did have jurisdiction over the person of respondent, because by appealing to the Florida Supreme Court, it in effect entered a general appearance.

D — THE DECREES ENTERED IN THE STATE COURT CONSTITUTED A COMPLETE DEFENSE TO THIS ACTION BROUGHT IN THE FEDERAL COURT.

Petitioner in the trial court, in this action brought on the certificates of deposit, properly pleaded the decrees entered in the State Court declaring the certificates void. (Transcript pp. 12 to 27). The Circuit Court of Appeals, in deciding that the trial court erred in overruling respondent's demurrer to the pleas, held that the decrees constituted no defense because: (1) the State Court had no jurisdiction in entering the decrees, (Transcript pp. 179 to 183); and (2) the effect of the decrees, even if the State Court had jurisdiction, was not to declare them absolutely void, (Transcript pp. 183 to 186).

We have already shown that no question of jurisdiction of the State Court can be raised, because in the first place, the proceedings were *in rem* and personal service was not necessary; and in the second place, had jurisdiction of respondent's person been necessary, the State Court had it by reason of the fact that respondent conferred jurisdiction over its person by availing itself of the Court's jurisdiction and prosecuting an appeal.

Turning now to the final ground of the Court of Appeals decision, we see that the effect of the decrees was in fact to declare the certificates of deposit absolutely void, and they undoubtedly constituted a perfect defense to the action on the certificates.

We first wish to point out that it was not proper for the Circuit Court of Appeals to consider the ques-

tion of the *effect* of the decrees. That question was not before it. The only question before it was the *validity* of those decrees, which validity turned on the question of the State Court's jurisdiction. The effect of the decrees, if valid, was in effect *admitted* to constitute a defense, for no question on that score was raised. The only objection raised by respondent in the trial court to the sufficiency of the decrees as a defense, was the claim that the decrees were void because they were entered by a court having no jurisdiction. It was not proper for the appellate court to consider objections not raised by the parties in the trial court. Its only power was to review the questions raised and passed upon in the lower court, and not to consider the pleadings *de novo*.

The only pleadings before the Circuit Court of Appeals were petitioner's pleas of *res adjudicata* and respondent's demurrer and replication to those pleas. In none of these pleadings was it contended that the effect of the decrees, if valid, was not to bar the action. The only objection raised to the pleas by respondent's demurrer and by its replications, was that the decrees were entered in suits *in personam*, and that the State Court in those suits had no jurisdiction over the person of the respondent. This was the only question raised by the pleadings. It was the only question argued by the parties. It was the only question which should have been considered by the Court of Appeals.

It is true, that the first ground of respondent's demurrer to the pleas, (Transcript p. 62) was that the plea "sets up no defense to the cause of action alleged in said count." This general ground of demurrer under the practice in Florida, which governed

the trial court under the Conformity Act, is a nullity. It amounts merely to a repetition of the demurrer and calls nothing to the attention of the Court.

The Supreme Court of Florida, in Heathcote v. Fairbanks-Morse Co., 60 Fla. 97, 53 So. 950, held:

> "A ground of demurrer to a plea that the same 'fails to state any sufficient defense to the plaintiff's cause of action' in effect merely repeats such demurrer and avers that such plea is bad in substance, and is not a compliance with the statute requiring the substantial matters of law intended to be argued to be stated."

All the other grounds of the demurrer were directed to the jurisdiction of the State Court in entering the decree, and the replications (Transcript pp. 66 to 146) were devoted entirely to the same objection. Therefore, the effect of the decrees, if valid, was never raised in the trial court, and should not have been considered by the Circuit Court of Appeals.

The rule concerning the necessity of making objections in the trial court in order that they may be made in an appellate court is well stated in 3 Corpus Juris, 892, where it said:

> "Only objections or grounds of objection urged in the trial court will be considered on appeal. The party will not be permitted to change them or add others. The appellate court is not a forum in which to discuss new points, but merely a court of review to determine whether the rulings of the court below, *as presented*, were correct or not.." (Italics ours).

As this Court said in Robinson & Co. v. Belt, 187 U. S. 41, 47 L. Ed. 65:

"WHILE IT IS THE DUTY OF THIS COURT TO REVIEW THE ACTION OF SUBORDINATE COURTS, JUSTICE TO THOSE COURTS REQUIRES THAT THEIR ALLEGED ERRORS SHOULD BE CALLED DIRECTLY TO THEIR ATTENTION, AND THAT THEIR ACTION SHOULD NOT BE REVERSED UPON QUESTIONS WHICH THE ASTUTENESS OF COUNSEL IN THIS COURT HAS EVOLVED FROM THE RECORD. IT IS NOT THE PROVINCE OF THIS COURT TO TRY THESE CASES *DE NOVO*."

An examination of the transcript of the record in this cause reveals that question as to the sufficiency of decrees as a defense, if valid, was never raised by the parties. Except as to their legality, no objection was made to them. The only place in the record where their effect as a defense, granting their legality, was even suggested, appears in the opinion of the Circuit Court of Appeals.

Besides being improper, the action of the Court of Appeals in deciding against the effect of the decrees as defenses, was erroneous. The decrees constitute an absolute defense to this action on the certificates of deposit.

By the decrees pleaded, (Transcript pp. 27 to 56) it appears that the certificates of deposit concerned had been issued to cover and include the proceeds of certain notes executed by the complainants in the suits in the State Court. The State Court decreed:

(a) That the proceeds of the notes belonged to the complainants.

(b) That the American Bank and Trust Company

had no right, title, interest, claim, or demand of, in and to the proceeds of said notes.

(c) That the defendant Bank of Jasper (petitioner here) be directed to pay the proceeds of the note to the complainants in those suits.

(d) That the certificates of deposit, in so far as they covered the proceeds of the note were void, and of no effect.

There being no question as to the jurisdiction of the State Court to enter the decrees, suits could not be maintained on the certificates of deposit after the decrees were entered. The question of the petitioner's liability on the certificates was *res adjudicata*. It had already been compelled to pay the amounts represented thereby to persons other than the respondent, and respondent was specifically decreed to have no interest therein or right thereto.

What better defense to the action in the lower court could be conceived, than the existence of these decrees? It is a fundamental principle that matters should be litigated but once, and once a competent court has passed on questions in dispute, they must be forever at rest.

But the Circuit Court of Appeals took it upon themselves (although respondent was content with the effect of the decrees, if valid, and only asked the Court to pass upon the question of their validity) to decide that the decrees were insufficient as a defense because they merely established the fact that the non-residents had no right in the "supposed" fund in the Jasper Bank, and did not hold that the Jasper Bank was not personally liable on the certificates.

But the decrees *do* pass on the personal liability

of the Jasper Bank on the certificates of deposit. The certificates represented the proceeds of certain notes, and the Jasper Bank was enjoined from paying those proceeds — in other words the amounts of the certificates — to American Bank and Trust Company, *or to anyone for it,* (Transcript pp. 27 to 56). Is this not an adjudication that the Bank of Jasper should not be liable on the certificates to American Bank and Trust Company or its endorsees?

The decrees further adjudge that the certificates of deposit are *void and of no effect.* Is not this an adjudication that the Bank of Jasper should not be personally or otherwise liable thereon? How can one be liable on a void instrument — on something that has no existence?

But the Circuit Court of Appeals said the decrees did not declare the certificates void absolutely, but only in so far as they covered and included the proceeds derived from the notes (Transcript p. 185). *But there is nothing to show that the entire amount of the certificates did not represent the proceeds of the notes.*

It is true the decrees adjudged the certificates void only in so far as they covered and included the proceeds of the notes, but the record shows that the entire amount of the certificates consisted of the proceeds of the notes. The certificates were issued to cover such proceeds and there is absolutely no showing made that one cent of the amount represented by the certificates consisted in anything other than such proceeds.

If, as a matter of fact, only a part of the amounts represented by the certificates consisted of the proceeds of the note, and if a part of the amount con-

sisted in other deposits, *it was incumbent on the respondent to show it.* The petitioner's pleas of *res adjudicata* (Transcript pp. 12 to 27) allege that the certificates of deposit *represent and cover* the proceeds of the notes mentioned in the decrees. This allegation is not denied. The replications of respondent (Transcript pp. 66 to 146) do not say that the certificates only partially cover the proceeds of the note. They are concerned only with the jurisdiction of the Court in entering the decrees and by their silence, admit that the certificates represented the proceeds of the notes and that therefore the decrees adjudged them totally void and of no effect.

As the pleadings show that the certificates cover only the proceeds of the notes, they show, therefore, that the certificates were declared absolutely null and void. No action could therefore be maintained on them and the decrees pleaded constituted perfect defenses to the action.

CONCLUSION

We respectfully submit that the writ of certiorari applied for should be issued in this instance. The record shows a plain case of conflict between a State and a Federal Court in reference to one and the same controversy.

The Circuit Court of Appeals, we contend, erred in deciding contrary to the Supreme Court of Florida, for the following reasons:

1. The proceedings in the State Court were proceedings *in rem* and jurisdiction over the person of the non-resident defendants was not necessary.

2. The State Court had jurisdiction over the persons of the non-residents by reason of their voluntarily availing themselves of the State Court's jurisdiction to prosecute appeals therein.

3. The only question before the Circuit Court of Appeals was the one of the State Court's jurisdiction to enter the decrees pleaded.

4. The effect of the decrees was to declare the certificates of deposit absolutely void and to bar further action thereon.

Respectfully submitted,

F. P. FLEMING,
Attorney and of Counsel for
Petitioner

Office Supreme Court, U. S.
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CLERK

In The Supreme Court of the United States

October Term 1921

No. 76

THE BANK OF JASPER, a Corporation,
Petitioner,

VERSUS

THE FIRST NATIONAL BANK OF ROME,
a Corporation,
Respondent.

BRIEF FOR PETITIONER ON WRIT OF CERTIORARI

F. P. FLEMING,
Attorney and of Counsel for Petitioner.

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In the Supreme Court of the United States

October Term 1921

No. 76

THE BANK OF JASPER, a corporation,
Petitioner,
vs.
THE FIRST NATIONAL BANK OF ROME, a corporation,
Respondent.

BRIEF FOR PETITIONER ON WRIT OF CERTIORARI

STATEMENT OF THE CASE

The Respondent, which was the original plaintiff, instituted this suit against the Petitioner, which was the original defendant, in the United States District Court for the Southern District of Florida, on the 27th day of January, 1913, on five certificates

of deposit (numbered 315, 316, 317, 318 and 319) (Transcript, pp. 6-8) alleged to have been issued by Petitioner to the American Bank and Trust Company and subsequently endorsed to the Respondent. The jurisdiction of the trial court was based on diversity of citizenship. (Transcript, p. 3). A judgment was entered in the said District Court in favor of the Petitioner on the 9th day of January, 1919. From said judgment said Respondent sued out a writ of error to the United States Circuit Court of Appeals for the Fifth Circuit, which Court on the 10th day of March, 1920, reversed the judgment of the said District Court. From said judgment of said Circuit Court of Appeals, Petitioner sued out a Petition for Writ of Certiorari to this Honorable Court, which was granted on the 15th day of October, A. D. 1920.

Prior to the institution of this action in the United States District Court as aforesaid, on to-wit, the 3rd day of January, A. D. 1913, there were filed in the Circuit Court, in and for Hamilton County, Florida, a court of general jurisdiction, bills of complaint by C. L. Adams, A. L. Wise, J. B. Wetherington, M. W. O'Cain, J. T. Thaggard, B. F. Carter and C. W. Smith, in separate suits, against Rome Insurance Company, American Bank and Trust Company, The First National Bank of Rome, (Respondent herein), and against your petitioner (Transcript, pp. 9, 10, 12, 13, 14, 15 and 17), praying that certain certificates of deposit, (being the same certificates of deposit sued on in this cause) be declared to be null and void; that the contracts of

sale of certain stock by reason of which said certificates were issued be decreed null and void and certain notes given by complainants to petitioner pursuant thereto, and the basis of said certificates, be cancelled and surrendered. (Transcript, pp. 9 to 15).

It was alleged in said bill of complaint that the said certificates of deposit were issued by the respondent based on certain notes issued by the complainants to the order of petitioner pursuant to a contract of sale of stock of the Rome Insurance Company; that said contract was fraudulent; and that the proceeds of said notes remained in the hands of petitioner (Transcript, pp. 7, 10, 35, 45).

In said suits in the said Circuit Court in and for Hamilton County, Florida, service of process was had upon The First National Bank of Rome, (the original plaintiff herein) by publication under the provisions of Section 1866 General Statutes of Florida, Section 3111, Revised General Statutes of Florida (year 1920) (Transcript, pp. 18 to 42). Your petitioner, a resident of the State of Florida, was personally served with process.

Upon the return day fixed in this order of publication The First National Bank of Rome, (original plaintiff here) filed special appearances and motions to quash the service (Transcript, pp. 62 and 70), which motions were in substance confined to the one ground that the proceedings brought in the State Court were actions in personam and that there had been no personal service on said The First National Bank of Rome. These motions having come on to be heard before the Circuit Court of

Hamilton County, Florida, said Court on the 14th day of March, and the 3rd day of April, 1913, denied said motions (Transcript, pp. 63 and 71).

Thereupon, on the 10th day of April, A. D. 1913, stipulations were entered into between solicitors for the respective parties in the suits in the State Courts, (transcript, p. 54), providing that all proceedings in said suits be stayed pending the prosecution of an appeal to the Supreme Court of Florida in the case of B. F. Carter vs. Rome Insurance Company, et als, which appeal was from orders of the State Court denying similar motions to quash service by publication on similar grounds, and it was further provided in and by said stipulations (Transcript, p. 54, 86, 89, 92, 95, 98) that the ultimate decision of the said appeal in said case of B. F. Carter vs. Rome Insurance Company, et als., would be decisive of the validity of the service by publication on the defendant in those suits, and if the service in the said Carter case be ultimately held defective and ordered quashed then the service in the other cases shall be held defective and shall be quashed.

At the June term, 1913, of the Supreme Court of Florida, that Court affirmed the order of the lower court in the case of B. F. Carter vs. Rome Insurance Company, et als., which decision is set forth in full (Transcript, p. 81). The service by publication was not held defective and was not quashed.

The decision of the Supreme Court of the State of Florida in Rome Insurance Company, et als., vs. J. H. Corbett, a companion case, on the authority

of which, said case of Rome Insurance Company, et als., vs. B. F. Carter was decided, is set forth in full (Transcript, pp. 82 and 83).

Thereafter, The First National Bank of Rome took no further part in the proceedings in the State Court, (Transcript, pp. 18 to 42) and on the 14th day of July, 1914, final decrees were entered in the State Court (Transcript, pp. 18 to 42), which decrees adjudged that the certificates of deposit therein mentioned, (being the same certificates of deposit herein sued upon) were void and of no effect and enjoined your petitioner from paying the proceeds thereof to The First National Bank of Rome, or to anyone for it.

Following the decrees of the Circuit Court of Hamilton County, Florida, your petitioner filed pleas of res adjudicata, (Transcript, pp. 9 to 19) in this suit setting up the decrees entered in the Circuit Court in and for Hamilton County, Florida, which decrees adjudged the certificates of deposit herein sued upon to be void and of no effect, and which enjoined your petitioner from paying the proceeds thereof to the plaintiff below or to anyone for it. Certified copies of said decrees were attached to said pleas, (Transcript, pp. 18 to 42). On page 15 of the Transcript the additional second plea is shown as being addressed to the "fourth" count of declaration; this is a typographical error, the word "fourth" should read "fifth."

To these additional pleas the plaintiff in the trial court (the respondent here), filed a demurrer (Transcript, pp. 42 to 43) which demurrer was overruled

(Transcript, p. 44). Thereupon respondent filed replications to said pleas, (Transcript, pp. 45 to 52), setting up in substance by said replications that the chancery suits mentioned in your petitioner's pleas (Transcript, pp. 9 to 18), were actions in personam; that no personal service was ever had on said respondent; that it did not at any time or in any manner appear in said suits, except specially to contest the service by publication therein made, and that it in no way waived the want of jurisdiction of the State Court over its person. There were attached to said replications copies of the records in the said chancery suits mentioned (Transcript, pp. 52 to 99).

Petitioner filed a motion to strike (Transcript, p. 99) and a demurrer, (Transcript, pp. 99 and 100) to said replications. Subsequently respondent moved for leave to withdraw its replications and to file additional grounds of demurrer to the additional pleas and for a re-argument of the demurrer to the additional pleas. This motion was denied and petitioner's demurrer to the replications was sustained.

Thereupon, upon respondent's withdrawing all its pleas except the additional pleas setting up res adjudicata plaintiff in the trial court (the respondent here) filed a declination to plead further (Transcript, p. 105), and final judgment was entered in favor of your petitioner, (Transcript, pp. 106 and 107).

From said judgment, said plaintiff (the respondent here) sued out a writ of error to the Circuit Court of Appeals of the United States for the

Fifth Circuit which Court on the 10th day of March, 1920, reversed the judgment of the District Court, (Transcript, pp. 118 to 125) holding in effect:

(a) That the Circuit Court in and for Hamilton County, Florida, acquired no jurisdiction over the person of the respondent, The First National Bank of Rome, by the service by publication made in said suits.

(b) That said Circuit Court in and for Hamilton County, Florida acquired no jurisdiction over the fund or res sought to be impounded in said chancery suits, as the same was not under the control of the Court,

(c) That the Florida Court had no jurisdiction to render the said decrees as to non-residents.

(d) That the said Court did not purport to determine the personal liability of your petitioner to the plaintiff on the said certificates of deposit.

(e) That the prosecutions of the appeals by respondent to the Florida Supreme Court, did not amount to general appearances in the State of Florida.

SPECIFICATIONS OF ERROR

First: Your petitioner represents unto this Honorable Court that the aforesaid judgment of the United States Circuit Court of Appeals for the Fifth Circuit is erroneous in this: it presents a conflict of State and Federal jurisdiction and in effect reverses the decision of the Supreme Court of the State of Florida in the case of Rome Insurance

Company, et als., vs. B. F. Carter (63 Sou. 834; Transcript, p. 81) and Rome Insurance Company et als., vs. J. H. Corbett (63 Sou. 833; Transcript, pp. 82 and 83) and denies them full faith and credit, for the following reasons:

(a) The United States Circuit Court of Appeals held that the prosecution of the appeals in the State Court did not amount to general appearances, whereas, The Florida Supreme Court, following the established rule of practice in that State, held that the prosecution of an appeal constitutes a general appearance in the lower court.

(b) The Florida Supreme Court held that the service by publication upon the respondent, The First National Bank of Rome, original plaintiff in this action, was valid so as to bring its person within the jurisdiction of the Court for the relief prayed in the bills of complaint. The Circuit Court of Appeals held otherwise.

(c) The Florida Supreme Court held that the bills of complaint confined their prayers to an adjudication of a fund sought to be impounded, and that said fund was within the jurisdiction and control of the State Court. The Circuit Court of Appeals held the contrary.

Second: Your petitioner further represents that said judgment of the United States Circuit Court of Appeals for the Fifth Circuit is erroneous on the following grounds:

(a) The fund impounded by the decree in the State Court had its situs in the State of Florida, and not in the State of Georgia; because:

(aa) The money was not to be payable except "on the return of this certificate properly endorsed."

(bb) The certificate was not subject to check.

(cc) The deposit was made for a specific purpose and was not the part of a general fund.

(dd) The situs of a debt for the purpose of administration, is the home of the debtor.

(b) The proceedings in the State Court, the decrees in which were set up as a defense by your petitioner in the District Court, were proceedings in rem, to the validity of which personal service is unnecessary.

(c) If any defects existed in the State Court's jurisdiction over The First National Bank of Rome (the respondent here) such defects under the rulings of the Supreme Court of Florida were waived by the prosecution of the appeals to the Florida Supreme Court.

(d) The decrees relied upon (Transcript, pp. 18 to 42) declared the certificates of deposit herein sued upon to be void and of no effect.

Third. Your petitioner further represents that no question was raised by the plaintiff, (the respondent here) either in the District Court or in the Circuit Court of Appeals as to the sufficiency of your petitioner's pleas of res adjudicata, except that the proceedings in the State Court were actions in personam and that no personal service was had on the plaintiff (the respondent here) one of the defendants in those proceedings. The Court of Appeals committed an error in considering and pass-

ing upon questions not raised in the trial court and not called directly to its attention.

Fourth. Your petitioner further represents that the said United States Court of Appeals for the Fifth Circuit, committed error in denying to your petitioner the benefit of the adjudication of the Supreme Court of Florida of a statute of that State and thereby assumed a jurisdiction which not even the Supreme Court of the United States has power to assume.

ARGUMENT

The petitioner in its argument expects to establish the following:

A. Federal Courts must recognize and apply rules of the State Courts concerning matters of procedure.

B. In Florida, the prosecution of appeals constitute general appearances.

C. The proceedings in the State Court were proceedings in rem, and personal service was unnecessary.

D. The decrees entered in the State Court constituted a complete defense to this action brought in the Federal Court.

A — FEDERAL COURTS MUST RECOGNIZE AND APPLY RULES OF STATE COURTS CONCERNING MATTERS OF PROCEDURE.

In considering the legality and effect of proceedings in State Courts, Federal Courts are not to

be governed by their own rule of procedure, or by general rule in other jurisdictions, but must apply and be governed by the rules of procedure of the State in which the proceedings were brought. It is an elementary proposition that matter of procedure is governed by the lex fori.

In York vs. Texas, 137 U. S., 15, 34 L. Ed. 604, this principle was clearly recognized. The facts of the case as well as the holding of the Court, appear in the following excerpt from the opinion:

> "It was conceded by the district and the supreme courts that the service upon the defendant in St. Louis was a nullity, and gave the district court no jurisdiction; but it was held that, under the peculiar statutes of the State of Texas, the appearance for the purpose of pleading to the jurisdiction was a voluntary appearance, which brought the defendant in to court. Plaintiff in error questions this construction of the Texas statutes, but inasmuch as the Supreme Court, the highest court of the State, has so construed them, such construction must be accepted here as correct, and the only question we can consider is as to the power of the State in respect thereto."

The York case has been followed and the rule approved and applied in the following decisions:

Missouri etc. Ry. vs. Goodrich, 234 U. S. 1429; 58 L. Ed. 1578.

Missouri etc. Ry. vs. Goodrich, 229 U. S. 607; 57 L. Ed. 1349.

Kauffman vs. Wooters, 138 U. S., 287; 34 L. Ed. 962.

McLaughlin Brothers vs. Hollowell, 228 U. S. 289; 57 L. Ed. 840.

Western Ind. Co. vs. Rupp, 235 U. S. 261; 59 L. Ed. 220.

In the last case cited it was said:

> "That a state, without violence to the 'due process' clause of the 14th Amendment, may declare that one who voluntarily enters one of its courts to contest any question in an action there pending shall be deemed to have submitted himself to the jurisdiction of the court for all purposes of the action, and may attach consequences of this character even to a special appearance entered for the purpose of objecting that the trial court has not acquired jurisdiction over the person of the defendant, is settled by the decision of this court in York v. Texas, 137 U. S. 15, 34 L. Ed. 604, 11 Sup. Ct. Rep. 9; followed in Kauffman v. Wooters, 138 U. S. 285, 34 L. Ed. 962, 11 Sup. Ct. Rep. 298."

Elaborating on the principles underlying this rule, the opinion continues:

> "The 14th Amendment declares that no state shall 'deprive any person of life, liberty, or property without due process of law.' This prohibition has regard not to matters of form, but to substance of right. Since its adoption, whatever was the rule before, a non-resident party against whom a personal action is in-

> stituted in a state court without service of process upon him may, if he please, ignore the proceedings as wholly ineffective, and set up its invalidity if and when an attempt is made to take his property thereunder, or when he is sued upon it in the same or another jurisdiction. Pennoyer v. Neff, 95 U. S. 714, 732, 733, 24 L. Ed. 565, 572; York v. Texas 137 U. S. 15, 21, 34 L. Ed. 604, 605, 11 Sup. Ct. Rep. 9. But if he desires to raise the question of the validity of the proceeding in the court in which it is instituted, so as to avoid even the semblance of a judgment against him, it is within the power of the State to declare that he shall do this subject to the risk of being obliged to submit to the jurisdiction of the court to hear and determine the merits, if the objection raised to its jurisdiction over his person shall be overruled. This prevents a defendant from doing what plaintiff in error has attempted to do in the present case; that is, to secure, if possible, the benefit of a binding adjudication in its favor upon the merits, through the exercise of the court's jurisdiction, while depriving its adversary of any possibility of success by reserving an objection to the jurisdiction of the court to render any judgment against it."

The identical situation presented by the record herein existed in the case of Foster Milburn Co. vs. Chinn (C. C. A. 2nd Circuit) 202 Fed. 175, where the Court said:

> "It is certainly the general rule of the federal courts that an objection once taken to the jurisdiction is not waived by the defendant's subsequently answering and taking part in the

trial. Harkness v. Hyde, 98 U. S. 476, 25 L. Ed. 237. It is also true that the defendant may attack a judgment of the court of another state for lack of jurisdiction, either appearing on the face of the record or proved by testimony. Thompson v. Whitman, 18 Wall. 457, 21 L. Ed. 897. It is, however, the law of the State of Kentucky, that though the defendant appear specially to object to the jurisdiction of the court, if he thereafter appeal to a higher court from any judgment recovered against him in the action, he ipso facto waives his objection and transforms his special into a general appearance. It is not necessary for us to determine whether the service of process upon Monroe, as managing agent, was good or bad. We are obliged under Section 905, U. S. Rev. St. (U. S. Compt. St. 1901, p. 677) to give full faith and credit to the judgment; that is to say, the same faith and credit it would have 'by law or usage' in the state of Kentucky. So doing, we must treat the defendant as having appeared generally. The trial judge was right in holding that a usage established by the decision of the highest courts of Kentucky is to be given the same effect as if established by statute. In the latter case the Supreme Court has held that such a rule is binding in a suit upon a judgment in the courts of another State. York v. Texas, 137 U. S. 15, 11 Sup. Ct. 9, 34 L. Ed. 604."

On page 31 of respondent's brief in opposition to application for certiorari (filed October Term, 1920) is cited the case of Harkness vs. Hyde, 98 U. S. 476, 25 L. Ed. 237, as authority for the proposition that "Illegality in a proceeding by which juris-

diction is obtained is not waived by the appearance of the defendant for the purpose of calling the attention of the court to such irregularity."

The case cited has no bearing on the points involved here. Petitioner is not arguing that the mere appearance for the purpose of objecting to the court's jurisdiction amounts to a general appearance. Our position is that the prosecution of the appeal amounted to such a participation in the proceedings as to amount to a general appearance.

Furthermore, the Harkness case does not touch upon the rule laid down in York vs. Texas, 137 U. S. 15, 34 L. Ed. 604, which admitted that the rule in the Federal Court was as stated in the Harkness case, but held that where the State Supreme Court had held certain acts to constitute a general appearance, the Federal Courts were bound to follow the rules of the State courts.

None of the cases cited in respondent's said brief (filed October Term, 1920) meet this proposition. We later cite cases in this brief to show that in Florida the undoubted rule is that an appeal amounts to a general appearance. This being a matter of procedure, the Federal courts must apply the same rule.

For the above reason, the following cases cited by respondent in its said brief at pages 20, 30 and 31, respectively, are absolutely not in point:

Davis vs. C. C. C. & St. L. R. Co., 217 U. S., 157, 54 L. Ed. 708.

Pugh vs. Loisel, 219 Fed. 417 (5th Cir. C. C. A.)

Smith vs. Gov. of Canal Zone, 249 Fed. 273, (5th Cir. C. C. A.)

In the matter of Indiana Transp. Co. 244 U. S. 456; 61 L. Ed. 1253.

All the Federal cases cited by respondent are cases in which the question of jurisdiction arose in the lower Federal Court. York vs. Texas, 137 U. S. 15, 34 1 Ed. 604, holds that regardless of the rule in Federal Courts, a rule of practice in a State Court will be followed by the Federal Court, as the State has full power over procedure in its courts, and further holds that a rule that a qualified appearance is a waiver of defects in jurisdiction is not a denial of due process of law.

B — IN FLORIDA, THE PROSECUTIONS OF APPEALS CONSTITUTE GENERAL APPEARANCES.

In determining, then, the legality of the proceedings in the State Court, the Circuit Court of Appeals erred in not giving full faith and credit to the judgment of the Florida Supreme Court, which considered that the appeal waived the objections to the service. The rule in Florida is well settled that the prosecution of an appeal constitutes a general appearance, and the Circuit Court of Appeals should have applied this rule.

The Florida rule is stated and applied in the following decisions:

Tunno and Jessup & Co. vs. Robert, 16 Fla. 738.

Stanley vs. Arnow, 13 Fla., 361.

Henry vs. Spitler, 67 Fla., 146, 64 So. 745.

Busard vs. Hutson, 65 Fla., 479, 62 So. 483.

Barnick vs. Rouse, 53 Fla., 643, 43 So. 753.

Hayman vs. Neil, 53 Fla., 127, 44 So. 176.

Rumeli vs. Tampa, 48 Fla., 112, 37 So. 563.

Wylly vs. Sanford, L & T Co., 44 Fla., 818, 33 So. 453.

Schrader vs. Schrader, 36 Fla., 502.

Rome Ins. Co. vs. Corbett, Transcript herein, p. 82.

The Circuit Court of Appeals in its decision (Transcript, p. 121) stated that "The rule in Florida, differing from that which obtains in the Federal courts, is to the effect that an appellant, though objecting to the insufficiency of service successfully, is considered in Court upon the return of the case to the lower court." On the same page of its opinion the Court of Appeals conceded that "this court will follow the rule of decision in the State Court in passing upon a judgment in that Court."

But the Circuit Court of Appeals failed to follow the State rule of decision on the ground that it was not applicable to an appeal from an interlocutory order of the Court, as distinguished from a final decree. Such a distinction is not made by the Florida Courts. The Florida Courts have always used the word "appeal" and have not limited it to the character of the appeal. It was made only by the United States Circuit Court of Appeals, which applied *its own rule of decision* instead of that of the Florida Court.

The Supreme Court of Florida indicated very plainly that the rule was applicable in the *same proceedings* considered by the Court of Appeals.

In the case of Rumeli vs. Tampa, 48 Fla., 112, 37 So. 563, it appeared that the error complained of was an interlocutory order, that of the entry of a decree pro confesso. The Supreme Court of Florida reversed the final decree on the ground that the entry of decree pro confesso was erroneous because the Court did not have jurisdiction of the defendant but held that by the appeal the defendant was then in Court. The sole contest was whether the Court had jurisdiction of the defendant, not on the merits, and it would be idle mockery to say to the defendant, you appealed from the final decree entered on a void decree pro confesso, assigning as error the entry of the interlocutory decree pro confesso and you are therefore in Court, but had you appealed from the decree pro confesso your appeal would not have constituted an appearance. The Court makes no such distinction.

In the case of Tunno and Jessup & Co. vs. Robert 16 Fla., 738, two appeals were presented by the appellants named from several interlocutory decrees and a final decree. There was no final decree against M. K. Jessup & Co. The Supreme Court of Florida at page 750 of text said:

> "We next treat the appeal of M. K. Jessup & Co. There is no decree in this record against these parties signed by the judge. There is an entry in the record ordering the bill to be taken for confessed signed by plaintiff's attorney. Anterior to this there is an affidavit by plaintiff's attorneys, that M. K. Jessup & Co. reside in New York, as shown by the return of the Sheriff, that they are not to be found in the county, and a suggestion that they reside in New York, and there is an order of publication by the judge. There is no evidence 'by affidavit to the judge' that any publication was ever made of this order. This is a requirement of the statute in order to perfect a constructive service in such cases, and it must appear in the record; nor is there any authority in such cases for an order taking the bill *pro confesso* to be entered by the plaintiff's attorney. It must be granted by the judge, (Thomp. Dig. 452). The persons composing the firm of M. K. Jessup & Co., having appeared upon this appeal in this court, upon the return of the cause to the Circuit Court must be considered as regularly before the court in like manner as if duly served with process. 13 Fla. 368; 1 Pike 50, 376, 386, 405; 4 Bibb 84, 167.
>
> "The decrees of the 21st day of February A. D. 1877, and of the 16th day of July 1877,

> and the order taking the bill as confessed against M. K. Jessup & Co. are reversed and set aside, and the case is remanded for further proceedings conformable to law and not inconsistent with this opinion."

In the above case in the appeal of M. K. Jessup & Co., there is no decree in the record against these parties signed by the judge; there is no showing of proper service by publication on said parties; there is no order by the judge taking the bill pro confesso against said parties; there is no showing of any final decree or proper interlocutory decree against said parties. Yet the Florida Supreme Court in its opinion holds: (Ibid text 151)

> "The persons composing the firm of M. K. Jessup & Co. having appeared upon this appeal in this court, upon the return of the cause to the Circuit Court must be considered as regularly before the court in like manner as if duly served with process."

In view of the facts in the above case and the opinion of the Supreme Court therein, such opinion clearly indicates that the prosecution of all classes of appeals to the Florida Supreme Court constitute general appearances on the return of the cause to the court from which it was appealed.

In the case of Standley vs. Arnow, 13 Fla., 386, it appeared that the defendant had moved in the lower court to set aside the report of the master for want

of notice of the hearing before him, and also to set aside the order Pro Confesso on the ground that she had a meritorious defense, and because no subpœna in said cause had been served upon her, which motion was overruled by the Court.

The Supreme Court of Florida held that the lower Court did not have jurisdiction of the defendant to enter a decree, and reversed the orders and decrees entered in the lower Court, but held:

> "The decree of the Circuit Court, and all other orders and proceedings therein subsequent to the return of the subpœna, must therefore be reversed, with costs; but as the appellant has made herself a party to the suit by voluntarily appearing and prosecuting her appeal, she must, upon the return of the cause to the Circuit Court, be considered as regularly before the Court in like manner as if she had been duly served with process."

The Supreme Court of Florida adopted in the case of Standley vs. Arnow, supra, the rule pursued by the Court of Appeals in Kentucky and the Supreme Court of Arkansas, saying:

> "This course has long been pursued by the Court of Appeals in Kentucky and the Supreme Court of Arkansas, and is adopted as a proper practice in like cases. *Vide* 1 Pike, 50, 376, 386, 405; 4 Bibb, 84, 167."

Almost similar language is used by the Supreme Court of Florida as by the Supreme Court of Arkansas. Neither makes any distinction as to the

character of the appeal, but holds that such appeal is voluntary.

In the case of Gilbreath vs. Kuykendall, 1 Pike, 50, it appeared that the writ was issued in the name of the United States and not of the State of Arkansas. The process was held void, but the Court in its opinion said:

> "But as the plaintiff in error has now made himself a party to the suit by voluntarily appearing and prosecuting his writ of error, according to the rule of practice in similar cases by the Court of Appeals of Kentucky, in which we fully concur, he must, upon return of the case to the court below, be considered as regularly before the Court in like manner as if he had been duly served with process."

In the case of Murphy vs. Williams, 1 Pike, 276, it appeared that the writ was returnable to the 1838 Term, while default was entered at the 1837 Term. The default was held error, but the Court at page 385 said:

> "But as the appellant has appeared here and assigned his errors, he has become a party to the proceedings and consequently Murphy, in accordance with the rule laid down in Gilbreath vs. Kuyendall, is bound to appear in the Circuit Court when the same proceedings will be had in this suit, as though he was served with a valid process."

In the case of Graves vs. Hughes, 4 Bibb 84, the Court found that Graves had not been served with process, but that service was made on another per-

son by the name of Graves, and held that jurisdiction was not acquired to enter default. The Court said:

> "The decree as to Graves is therefore erroneous and must be reversed, the cause remanded to the court below and the order taking the bill as confessed against Graves set aside, and he may have leave to answer the bill should he apply for leave to do so; but if he should not apply for leave to answer, then, as by the laws now in force, a copy of the bill need not be delivered, and as he has appeared to the cause an order again may be entered taking the bill as confessed."

Judgment by default in ejectment upon void service, was reversed in the case of Wharton vs. Clay, 4 Bibb 167, but the appeal was also held to constitute an appearance, the Court saying:

> "The judgment must therefore be reversed with costs, and the cause remanded to the Court for new proceedings, but as the tenants in possession appear now to have notice of the pending of suit, unless they should appear and plead, judgment by default may be entered."

The rule announced in Standley vs. Arnow has been adhered to by the Supreme Court of Florida.

In Shrader vs. Shrader, 36 Fla., 502, on page 518, the Court says:

> "Mrs. Shrader, the appellant in Case No. 2 having by her appeal made herself a party to such case, should proceed to plead to the bill of complaint therein. Standley vs. Arnow, 13 Fla., 361."

In Wylly vs. Sanford Loan & Trust Co., 44 Fla., 818, 820, the Court says:

> "The appeal of the defendants operated as an appearance in the cause however, which will enable the Court below now to proceed in the matter. Standley vs. Arnow, and Finlayson vs. Lipscomb, supra."

In Rumeli vs. City of Tampa, 48 Fla., 112, on page 114, the Court says:

> "The appeal of the defendant, Rumeli, operated as an appearance in the cause, however, which will enable the Court below to proceed in the matter. Wylly vs. Sanford Loan & Trust Co., 44 Fla. 818."

In the case of West Ind. Co. vs. Rupp., 235 U. S., 261, 59 L. ed. 220, at page 225 of the text, the Court said:

> "It does not appear that the Court's attention was called to any decision by the courts of Illinois placing a different construction, or indeed, any construction, upon the section in question. If such decision existed, it was incumbent upon defendant to prove it as matter of fact. We are referred to no authoritative judicial construction of the statute in the state of its origin, nor have we searched for any, for what is matter of fact in the state court is matter of fact in this court upon review; and this applies where foreign law is in question in the state court as well as to any other issue of fact. Janley v. Donoghue, 116 U. S. 1, 6, 29 L. ed. 535, 537, 6 Sup. Ct. Rep. 242; Chicago & A. R. Co.

v. Wiggins Ferry Co. 119 U. S. 615, 622, 30 L. ed. 519, 522, 7 Sup. Ct. Rep. 398."

The above is similar to the case presented by the record herein; it does not appear that any Florida decision was called to the attention of the Circuit Court of Appeals, and said court cites no Florida decision, holding that an appeal from an interlocutory order of the court does not constitute a general appearance, as distinguished from an appeal from a final decree.

There is no basis for the distinction in the Florida decisions, but on the contrary, the rule is applied, as shown by the cases cited, to appeals from final decrees, on the merits as well as jurisdictional questions.

The reason underlying the rule is the same, regardless of the nature of the order appealed from. It is, of course, that any one who so far submits himself to the jurisdiction of the courts of a state as to avail himself of the machinery of the courts to prosecute an appeal, is "in court" and he can not claim at the same time, to be "out of court," by any fiction of special appearance, or so-called "special appeal." It is not the nature of the decree appealed from that determines the fact of appearance, but the fact of *voluntarily taking an appeal.*

Respondent claimed that the appeal in the State court was not "voluntary," but *it failed utterly to show any compulsion of any sort requiring it to resort to appellate procedure.* If it was convinced of the illegality of the service, it could have ignored

the proceedings entirely as wholly ineffective, and could have set up its invalidity if and when an attempt was made to take its property thereunder.

West Ind. Co. vs. Rupp, 225 U. S., 261, 59 L. ed. 220.

Pennoyer vs. Neff, 95 U. S., 732, 24 L. ed. 522.

York vs. Texas, 137 U. S. 15, 34 L. ed., 604.

The word "voluntary" has been defined by the Courts as, "done by design or intention; purposely; intentional; not accidental."

Williams vs. United States Mutual Association, 31 N. Y. Supp. 343, 346; 82 Hun. 268.

Travelers' Ins. Co. vs. Randolph, 78 Fed. 754, 762; 24 C. C. A. 305.

Campbell vs. Fidelity & Casualty Co., 60 S. W. 492, 495; 109 Ky. 661.

The respondent in support of its construction of the word "voluntary" has cited in previous briefs the cases of Craighead vs. Martin, 25 Minn., 41; Freer vs. White, 41 Mich., 74, 51 N. W. 807; and Pugh vs. Loisel, 219 Fed., 417, 424; to the effect that the effect of appearing to contest jurisdiction cannot be regarded as a voluntary appearance in the cause. This rule is true in Florida in so far as the original Court is concerned and is so specifically held in the

case of Standley vs. Arnow, supra, where the Florida Supreme Court, speaking of the proceedings in the lower Court, stated:

> "But where a party appears and questions the jurisdiction by motion based upon an alleged defect of jurisdiction, it would be a violent presumption to say that he consents by objecting."

Yet, we have seen that the Supreme Court of Florida in that very case held that the taking of an appeal to the Supreme Court did constitute an appearance. Thus, the Court showed the distinction between the two proceedings, that of objecting to the jurisdiction in the lower Court and that of taking an appeal to the Supreme Court, and showed the different rules applying to the different proceedings, establishing conclusively that the prosecution of an appeal was a voluntary action constituting an appearance.

The appeal was voluntary. There was no process compelling appearance. There is no substantial difference between the instant case and the other cases decided by the Supreme Court of Florida.

Had no appeal been taken, the question could very well have been raised in this suit in the District Court. But having appealed, *voluntarily*, in the State Court, respondent waived its objection to the jurisdiction over its person under the undoubted Florida rule.

The reason and justice of the rule is this: it prevents a defendant from doing what respondent has

attempted to do in this case, that is, secure, if possible, the benefit of a binding adjudication in its favor *through the exercise of the court's jurisdiction;* and at the same time to deprive its adversary of any possibility of success by reserving an objection that the Court had no jurisdiction to render any judgment against it.

> West Ind. Co. vs. Rupp, 235 U. S. 261, 59 L. ed. 220; 225.

These reasons underlying the Florida rule apply regardless of the nature of the decree appealed from, and the Court of Appeals erred in failing to apply it to the proceedings under consideration.

In the case of the Chicago Life Insurance Co. vs. Cherry, 244, U. S. 25-30, 61 L. ed. 966 (decided May 7th, 1917) at page 969, in its opinion the court says:

> "But when the power of the court in all other respects is established, what acts of the defendant shall be deemed a submission to its power is a matter upon which states may differ. If a statute should provide that filing a plea in abatement, or taking the question to a higher court, should have that effect, it could not be said to deny due process of law. The defendant would be free to rely upon his defense by letting judgment go by default. York v. Texas 137 U. S. 15, 34 L. Ed. 604, 11 Sup. Ct. Rep. 9, Western Life Indemnity Co. v. Rupp, 235 U. S. 261, 272, 273, 59 L. Ed. 220, 224, 225, 35 Sup. Ct. Rep. 37. If, without a statute, a

court should decide as we have supposed the statute to enact, it would infringe no rights under the Constitution of the United States. That a party that has taken the question of jurisdiction to a higher court is bound by its decision was held in Forsyth v. Hammond, 166 U. S. 506, 517, 41 L. Ed. 1095, 1099, 17 Sup. Ct. Rep. 665. It can be no otherwise when a court so decides as to proceedings in another state. It may be mistaken upon what to it is matter of fact, the law of the other state. But a mere mistake of that kind is not a denial of due process of law. Pennsylvania F. Ins. v. Gold Issue Min. & Mill Co. 243 U. S. 93, 96, ante, 610, 37 Sup. Ct. Rep. 344. Whenever a wrong judgment is entered against a defendant, his property is taken when it should not have been; but whatever the ground may be, if the mistake is not so gross as to be impossible in a rational administration of justice, it is no more than the imperfection of man, not a denial of constitutional rights. The decision of the Illinois courts, right or wrong, was not such a denial. If the Tennessee judgment had been declared void in Illinois, this court might have been called upon to decide whether it had been given due faith and credit. National Exch. Bank v. Wiley, 195 U. S. 257, 49 L. Ed. 184, 25 Sup. Ct. Rep. 70."

In the case of Forsyth vs. Hammond, 166 U. S., 506-520, 41 L. Ed. 1095-1100, we quote: Headnote No. 5:

"5. One who has voluntarily sought the judgment of the supreme court of a state to declare that a decree of a lower court was not only erroneous but void, although not a volun-

> tary litigant in the trial court, is bound by the judgment of the supreme court as res judicata, and cannot attack it collaterally in a circuit court of the United States."

In said case at page 1100, in its opinion the Court says:

> "The construction by the courts of a state of its Constitution and statutes is, as a general rule, binding on the Federal Courts. We may think that the supreme court of a state has misconstrued its Constitution or its statutes, but we are not at liberty to therefore set aside its judgments. That court is the final arbiter as to such questions."

C — THE PROCEEDINGS IN THE STATE COURT WERE PROCEEDINGS IN REM, TO THE VALIDITY OF WHICH PERSONAL SERVICE WAS UNNECESSARY.

In the foregoing pages of this brief we have shown that under the established rule in Florida, the respondent by appealing in the proceedings in the State Court, submitted itself to the jurisdiction of the Court and in effect entered a general appearance. Therefore the respondent was properly before the State Court for the entry of even personal decrees against it.

Even aside from this consideration however, the decrees in the State Court are binding and valid, because they are decrees *in rem*, entered in proceedings *in rem*, and to the validity of which personal service of process, or jurisdiction over the person is unnecessary. All that is essential is that there be a

thing, a *res*, property of the defendant, within the Court's jurisdiction.

Here again the Court of Appeals decided contrary to the Supreme Court of the State of Florida. The former held that the proceedings in the State Court were not proceedings *in rem*, because there was no *res* in the control of the State Court, (Transcript, p. 121). The Florida Supreme Court held that the proceedings were *in rem*, the bill not praying for a personal decree against the non-residents, but confining its prayer to an adjudication of the funds sought to be impounded, (Transcript, p. 82).

The Circuit Court of Appeals, we contend, is in error in considering the proceedings as actions *in personam*. The decrees in the State Court merely determined the rights of the parties to the *res* in the jurisdiction of the Court. This *res* was the *indebtedness*, or the supposed indebtedness of petitioner, on the certificates of deposit. These certificates represented a fund in the hands of the petitioner, The Bank of Jasper, a resident corporation.

The Court of Appeals considered the fund as a part of a *general* deposit, and that there was therefore no specific fund over which the Court could exercise control. An examination of the certificates of deposit (Transcript, pp. 6, 7 and 8) reveals that they did represent a special fund, or deposit, because they "were not subject to check" and because they were not payable except "on the return of this certificate properly endorsed." The

fact that the certificates were in the State of Georgia is immaterial. They were merely evidence of the deposits, which were in the Jasper Bank. These deposits consisted of the proceeds of promissory notes given by the complainants in the suits in the State Court to petitioner.

But even granting for the sake of argument, that there were no specific funds that could be identified, the *res* still existed. It was the *indebtedness* of the Bank of Jasper, created by the certificate of deposit, and the only purpose of the suits and the only effect of the decrees, was to adjudicate the rights of the parties to that indebtedness.

The Circuit Court of Appeals proceeded upon the theory that there can be no action *in rem* unless there be a *res* in the form of a *tangible* thing. But a *res* may as well be intangible as tangible. It is well settled that a *debt* is a *res* and that its situs is the home of the debtor, where it may be administered through actions *in rem*. It is only the recognition of this principle that garnishment proceedings can be justified. The debtor, The Bank of Jasper, being in the jurisdiction of the State Court, the debt, the *res*, was also in the Court's jurisdiction.

In Bristol vs. Brent, 30 Utah 108, 21 Ann. Cases 1125, it is said:

> "A proceeding by which jurisdiction is sought by attaching property, whether tangible or intangible such as a debt, is essentially a proceeding *in rem;* that is, a proceeding against a *rem* which is brought into the custody of the law and hence within the jurisdiction of the Court."

The foregoing citation is presented to show a debt is considered as a *res,* sufficient to support a proceeding *in rem.*

The same principal is illustrated by the following quotation from 12 R. C. L. 777:

> "When the jurisdiction of the court is based on the attachment of property, such as a debt, and not on the residence of the parties proceeded against the action is essentially a proceeding *in rem.* For example, an action in one state by a resident thereof against a resident of another state to recover an indebtedness, in which garnishment proceedings are instituted against a foreign corporation doing business in both states, the principal debtor being served by publication, is an action *in rem,* the *res* being the indebtedness due from the corporation to the defendant."

And in 5 R. C. L. at page 930, it is said:

> "The general rule of law is well settled, that for the purpose of founding administration, all simple contract debts are assets at the domicil of the debtor. *And the locality of such a debt for this purpose is not affected by a bill of exchange or promissory note having been given for it, because the bill or note does not alter the nature of the debt, but is merely evidence of it, and likewise it is held in the case of a note that the property has its situs in the place in which the maker resides and not where the note is held."* (Italics ours).

The above language is taken almost verbatim from the opinion of this court in Wyman vs. U. S. 109, 654, 27 L. Ed. 1068.

That a debt is a *res* is further evidenced by the following language used by the court in the case of Swedish American Bank. vs. Bleeker, 72 Minn., 383, 75 N. W., 740, 42 L. R. A. 283:

> "This is a proceeding *in rem.* Aultman v. Markley, 61 Minn. 404. The *res* is the indebtedness due from the garnishee to the defendant."

The Supreme Court of the United States has passed on the questions as here involved in the case of Goodman vs. Niblack, 102 U. S. 556, 26 L. Ed. 229, decided subsequent to Pennoyer vs. Neff, 95 U. S. 714, 24 L. Ed. 572. In the Goodman case the defendant, Niblack, as administrator of an estate, had in his hands One Hundred and Fifty Thousand Dollars, ($150,000.00). The plaintiff had a judgment against the decedent for Thirty-one Thousand Three Hundred and Forty-four Dollars and forty-four cents ($31,344.44). A bill in chancery was brought to subject the funds in the hands of the administrator to the payment of the judgment, it being claimed that the money was a trust fund, devoted by the decedent to the payment of the judgment. The Court, in referring to the possible inability to obtain service on the trustees of the money, held that service by publication would bind them in so far as the decree entered affected the funds in the hands of the administrator, Niblack. It was said:

> "This is a proceeding in equity to force a lien on the fund which is within reach of the court, and as the trustees and complainant have

the requisite citizenship, section 738 of the Revised Statutes provides a remedy for inability to serve process by an order of publication. If they appear, the suit will proceed as usual. If they do not appear, the decree, so far as it affects the fund in the hands of Niblack, will bind them; and that is all that is necessary to give the court jurisdiction to grant the relief prayed by defendant."

The situation here is very similar. Instead of an administrator having custody of the funds in question, we have a Bank in possession of the money. In each case, a trust is sought to be impressed on the funds for the benefit of the complainant. In each case the money is in the jurisdiction of the court, and the custodian of the money is before the court, personally served. No fundamental distinction can be observed, and the decision in the Goodman case, holding that the decree, insofar as it affected the funds, would be binding as to interested parties served by publication only, must be adhered to as controlling.

In Gamble vs. Dawson, 67 Washington, 72; 120 Pac. 1060; Ann. Cases 1913 D-501, an action in equity was brought against a resident corporation to have five thousand (5,000) of its shares of stock held by a non-resident defendant decreed to be the property of the complainants; to have such shares cancelled, and new ones issued to complainants; and to restrain the defendant corporation from transferring such shares of stock to any one but the complainants. It was held that the certificates of stock

were mere *evidences* of property; that the property represented by such shares of stock was in the corporation which was in the jurisdiction of the court; that the court had jurisdiction, accordingly, over such property and its decree adjudicating the title thereto was valid.

To the same effect is Jellenik vs. Huron Copper Mining Company, 177 U. S. 1, 44 L. Ed. 647, which, as the court said in its opinion, was for the purpose of removing an incumbrance, or cloud on the title to certain shares of stock of a resident corporation. The shares were owned by non-resident defendants who were served by publication only. The opinion is devoted mainly to the consideration of the question of whether the situs of the shares of stock was the residence of the corporation or the residence of the owner of the shares. It was held that the situs was the residence of the corporation, the corporation property being the property represented by the shares and certificates. Arriving at this conclusion, the court, without further discussion held that the court having jurisdiction over the property of the corporation could adjudicate the title to the shares of stock of the corporation.

That case is closely analogous to the instant case. In the suit referred to in defendant's (petitioner here) plea, (Transcript, p. 9) the property in question was in the jurisdiction of the court, although the certificate of deposit, or promise to pay over that property, which certificate of deposit was at most mere *evidence* of the money itself, was in another State. Under the holding in the Jellenik case,

it was proper for the court to adjudicate and determine the title to the deposit, although the holder of the certificate was a non-resident and served by publication only.

In the case of Quarl vs. Abbett, 102 Ind. 233, 52 Am. Rep. 662, the essential facts were similar to those here involved. That was a suit against two non-resident defendants to declare void as fraudulent a transfer between them of certain shares of stock in a resident corporation. The property concerned, that of the corporation, was in the court's jurisdiction. Service on the non-residents was had by publication. It was held that the judgment setting aside the transfer as fraudulent and subjecting it to the payment of complainant's demand, was valid, though based on constructive service of process on the non-resident claimants to the stock. We quote from the opinion:

> "It is a general principle that the process of the courts may reach and seize property within their jurisdiction. A man who brings property within the territorial jurisdiction of a State subjects it to the laws of that State. 'If a foreigner or citizen of another State,' says an able court, 'send his property within a jurisdiction different from where he resides he impliedly submits it to the rules and regulations in force in the country where he places it. What the law protects, it has the right to regulate.' Clark v. Tarbell, 58 N. H. 88. This general doctrine has been declared by other courts, among them our own. Ames Iron Works v. Warren, 76 Ind. 512; Green v. Can. Buskirt, 7 Wall. 139; Rice v. Curtis, 32 Vt. 460.

It is upon this general principle that our statutory provisions relative to notice by publication are founded. If property of a non-resident cannot be reached by legal process upon constructive notice, then our statutes were passed in vain, and are mere empty legislative declaration, without either force or meaning; for if the person is not within the jurisdiction of the court, no personal judgment can be rendered, and if the judgment cannot operate upon the property, then no effective judgment at all can be rendered, so that the result would be that the court would be powerless to assist a citizen against a non-resident. Such a result would be a deplorable one. If the rule were that which appellant's argument asserts, a citizen with a chattel mortgage could not enforce it on property within our borders against a non-resident, nor could a creditor enforce a lien against a man who had fled to Canada and made it his residence, although he had abundance of property within the State. Nor if the rule were as asserted, could property of a non-resident corporation within our limits be reached. But the rule is not as contended for; property within our jurisdiction may be seized upon process issued upon constructive notice. This has been often decided with respect to attachment proceedings. Jude Story says: 'Sometimes seizure or attachment is purely nominal, as for example of a chip, or a cane, or a hat. In other cases the seizure or attachment is bona fide of real property or personal property within the territory or of debts due to the non-resident persons in the hands of their debtors who live within the country. In such cases, for all purposes of the suit, the ex-

istence of the property so seized or attached within the territory constitutes a just ground of proceeding to enforce the rights of the plaintiff to the extent of subjecting such property to execution upon the decree or judgment.' Story Conf. Laws, para. 549. Wharton says: 'But when the thing is situate within the jurisdiction of the court, then proceedings in rem give a title to it against all the world.' Wharton Conf. Laws, para. 829. He applies this doctrine to the seizure of goods under a writ of attachment, and cites Ewer v. Coffin, 1 Cush. 23; Phelps v. Holker, 1 Dall. 261; Pawling v. Bird, 13 Johns 192; Arndt v. Arndt, 15 Ohio 33; McVicker v. Beedy, 31 Maine 314; Bissell v. Briggs, 9 Mass. 462.

"It is said by appellant's counsel that fraud is a question of fact, and therefore that such a question cannot be tried upon constructive notice. This position is not tenable. Any question affecting the status of the specific property within the jurisdiction of the court and the rights of the parties in the property may be tried. The purpose of notice by publication is to give the best notice practicable to non-resident defendants, and thus enable the court to fully decide the controversy respecting property within its jurisdiction, no matter what form the question may assume. If this be not true, then in attachment proceedings fraud could never be shown where non-residents were parties, and that this cannot be true is too clear to admit of debate.

"The authority to hear and determine a cause is jurisdiction to try and decide all of the questions involved in the controversy. The principle is an ancient one, and even in

the time when the contest between the chancery courts and the common law courts was hot and angry, it was recognized and enforced. Where the jurisdiction of the court once attaches it extends over the whole case, and the court will determine all questions necessary to a full adjudication of the controversy. Field v. Holzman, 93 Ind. 205; Carmichael v. Adams, 91 Ind. 526; 1 Pom. Eq. Jur. para. 231. The authority to determine whether property is subject to a lien, or liable to be seized under a writ of attachment, or liable to be applied to the payment of the claims of creditors, necessarily confers jurisdiction to determine the amount of indebtedness, for in almost every case the court must ascertain the indebtedness. Thus in an action to foreclose a mortgage, the court must ascertain the amount of the indebtedness, so in an action to enforce a claim against property fraudulently conveyed the amount of the debt must be ascertained, and so in attachment proceedings, the amount of the indebtedness must be ascertained in order to make the proper order for the sale of the attached property. In such cases the court in ascertaining the amount due does not proceed against the person but simply ascertains the amount that shall be adjudged a lien on the property, or that shall measure the extent of the creditor's claim against it. The statement of the amount in the finding and the decree of the court in such cases is not a personal judgment, but is a mere statement of a finding upon one of the questions in the case."

A case which cannot be distinguished from the one before this Honorable Court, is Loaiza vs. Su-

perior Court for San Francisco, 85 Cal. 11, 9 L. R. A. 376. There, some real property situated in Mexico had been sold to the complainants, through false and fraudulent representations of the vendors who lived in Mexico. When the property was purchased, the complainants delivered certain moneys and securities to a stakeholder in California. The property sold was in Mexico, and the defendant vendors were in Mexico. Suit was brought in California, the residence of the stakeholder, and where were located the funds sought to be impressed with trust in favor of the complainant. Service on the non-resident defendants, for whose benefit the stakeholder was holding the funds, was had by publication. It was held that as the property, title to which was to be adjudicated, was within the court's jurisdiction, judgment could be validly entered disposing of the property upon service by process by publication only on the non-resident claimants. In both that case and the instant case, personal property was involved. In both cases the property and the stakeholder were in the territorial jurisdiction of the court. In both cases the property concerned consisted of the purchase price for property sold through fraud. In both cases the defendants to whom the funds in question were payable, were non-residents, served by publication only. In both cases the relief sought was the same.

It was contended, in the Loaiza case, that because the defendants were non-residents, and not personally served, the court had no jurisdiction. In the course of the opinion, the California Court

points out the error into which counsel for the non-resident defendants had fallen in the application of the case of Hart vs. Sansom, 110 U. S. 115; Pennoyer vs. Neff, 95 U. S. 714, 24 L. ed. 572, and other cases relied on, and says: "But all this argument is based upon a misapprehension of the character and object of the action here under discussion and of the relation of the parties to each other at the commencement of the action." After reviewing a number of decisions of the United States Supreme Court, the opinion concludes:

> "Even in the case of Arndt v. Griggs, 134 U. S. 316 (33 L. ed. 918), cited by petitioner, the court says: 'It (the state court) cannot bring the person of a non-resident within its limits,—its process goes not out beyond its borders * but it may determine the extent of his title to real estate within its limits and for the purpose of such determination may provide any reasonable method of imparting notice.'
>
> "If the State Court had such power with reference to title to real estate held by a non-resident, how much the more will it have the same with reference to personal property situate within its jurisdiction. And the real and primary purposes of the action here under review is to determine the title and right to possession of the moneys and securities now within the jurisdiction of the court, secured from the plaintiffs in the action by fraud, under a contract which they were by law authorized to rescind, and did rescind, upon discovery of the fraud. Our Statute says that in such a case the person who gains a thing by fraud is an involuntary trustee of the thing gained, for the benefit of the

person who would otherwise have had it. Civil Code, para. 2224. This being so, it cannot be that the arm of equity is so short, or so weak, that the fraudulent trustee,— he who has become trustee by fraud,— by remaining beyond the jurisdiction of the court, can prevent the court from seizing upon the subject of the trust within its jurisdiction, and restoring it to the defrauded cestui que trust. That the court has such jurisdiction as is here claimed for it is fully sustained in Felch v. Hooper, 119 Mass. 52, where the case is clearly distinguished from that of Spurr v. Scoville, 57 Mass. 579, cited by petitioner; in National Exch. Bank v. Sterling, 31 S. C. 360; Quarl v. Abbott, 102 Ind. 233; in King v. Vance, 46 Ind. 251, where the court says: 'The defendant may be brought in by publication, and when thus notified a defendant is before the court for all purposes except the rendition of a personal judgment;' and in Martin v. Pond, 30 Fed. Rep. 15, where Mr. Justice Brewer says: 'It may be conceded that notice to the defendant is necessary to divest him of his rights and interest. But the publication is notice — it is equivalent to the personal service of summons.' "

Now in the proceedings relied on in defendant's additional pleas, (petitioner here), (Transcript, p. 9), the primary object of the suit was to determine the right of such non-resident defendants to a fund or deposit within the jurisdiction of the State Court, which fund or deposit, was created by such defendants by fraud, as the court held. Can it be declared to be the law that a person can come into the State of Florida, obtain money, or other personal property

through fraud, leave the property within the State and within the jurisdiction of the State courts, go to a distant State, and be immune against any action in a court of equity to have his pretended ownership of the property adjudicated by the forum in which the property is situate and in which the fraud was perpetrated? Are State courts to be held powerless to protect their citizens in such circumstances? Is it to be said that citizens can be defrauded of their property, and that the courts must sit idly by, with that property in plain view, and within their reach, impotent to make restitution, because those who committed the fraud have stepped over the border line of the State? Such is not, never has and never could be, the law. With the property in its jurisdiction, the court by giving statutory notice, as was done here, can adjudicate title to the property and restore it to the proper owner, although of course its decrees can have no personal effect on the absent parties not personally served. Such is the law as stated in the cases heretofore cited in this brief, and such is the law if reasoned out on the basis of justice, practicability and common sense.

The principle that a court may adjudicate the title to personal property within its jurisdiction, although the owners or claimants of such property are nonresidents and not personally served, has time and again been recognized and applied by the Supreme Court of the United States.

Chicago etc. R. R. v. Sturm, 174 U. S. 710, 43 L. ed. 1144.

Harris v. Balk, 198 U. S. 215, 49 L. ed. 1023.

N. Y. L. Ins. Co. v. Dunlevy, 241 U. S. 518, 60 L. ed. 1140.

L. & N. R. R. v. Deer, 200 U. S. 176, 50 L. ed. 426.

B. & O. R. R. v. Hostetter, 240 U. S. 620, 60 L. ed. 829.

Amparo Mining Company vs. Fidelity Trust Company (N. J.) 71 At. 605, was an action in equity, brought in New Jersey by a New Jersey corporation, against a Pennsylvania corporation which was served by publication only. The object of the bill was to establish title to 549,504 shares of stock belonging to the complainant, which the defendant claimed to own. The bill alleged that the defendant acquired the stock under such circumstances that it must be deemed to hold them in trust for the complainant. It was held that as the *res*, the stock, was in the court's jurisdiction, it could proceed to establish title thereto, notwithstanding the fact that the defendant owner thereof was a non-resident and not personally served. The opinion is exhaustive and instructive, reviewing thoroughly the authorities in point, and answering in detail all the possible objections that might be raised against the holding. The court stated that:

> "The authorities which control this court, indicate, I think, the following as the essential elements of an action quasi in rem: (1) A res located within the territorial limits of the

state in such a way that the state can, if it see fit to do so, exercise absolute power to control and dispose of it; (2) a course of judicial procedure, the object and result of which are to subject the res to the power of the state directly by the judgment or decree which is entered, as distinguished from a course of procedure which only affects or disposes of the res by compelling a party to the action to control or dispose of the res, in accordance with the mandate of the judgment or decree; (3) a course of judicial procedure on its face directed specifically toward the res so as to disclose this res to the defendant when reasonably notified of the action."

Then, after an interesting discussion too lengthy to be reproduced in this brief, the court continues:

"In supporting the proposition that the present suit is strictly a suit in personam the brief for the defendant alleges 'that the object of the suit is to obtain relief which could only be decreed in personam' and points out that 'the prayer is specifically limited to a decree directing the defendant to transfer the shares of stock in question' and that 'the operation of the decree would be purely against the person of the defendant.' In support of these views it is alleged that 'the case differs from those in which decrees are sought to compel the conveyance of lands' in which cases by statute the 'decree if not complied with by the defendant can operate itself as a conveyance' and it is insisted that 'no similar provision is made for the transfer of property purely personal' such as the shares of stock in question. This argu-

ment seems to rest upon a mistaken view of the nature of the case set forth in the complainant's bill and of the relief therein prayed for, as well as an inadequate view of the power of the Court of Chancery to enforce its decrees affecting personal property which it can sieze and control. The allegations of the bill show that the stock in litigation is charged with a trust for the complainant's benefit, and that the complainant is the equitable owner of this stock, and that the defendant, as executor, etc., has no estate or interest therein, excepting so far as the same stands as security for the sum of $40,000. The prayer of the bill is that the rights under the trust above mentioned may be established by the decree of the court, as well as that the defendant may be decreed to assign and transfer the said shares of stock to the complainant upon payment of the said sum of $40,000 with the interest thereon. Of course, it must be conceded that in any action to recover stock, if the relief prayed for includes the surrender of a certificate, or the execution of an assignment or power of attorney, such relief can only be obtained by compelling the defendant to act, and if such relief is the whole relief prayed for, the action, as we have seen, may be strictly in personam. In the present case, while the bill prays that the defendant may be decreed to assign and transfer the shares of stock in dispute, the main relief prayed for is the establishment of the complainant's equitable title. The jurisdiction of the court is sustained by the existence of a trust, a trust in respect to a res, situate within the jurisdiction of the court and in the custody of a party to the suit. If the complainant shall ob-

tain a decree in this case establishing its rights in respect of the res, and then shall desire to secure the surrender of the outstanding certificates representing the res, it may be obliged to bring a suit in the State of Pennsylvania in order to secure such a surrender. A similar situation would exist if the defendant were a natural person resident in New Jersey who had been duly served with process in New Jersey, but who had gone out of the State, carrying with him the certificates representing the stock which was the subject-matter of the litigation. In such a case, however, the decree would be enforceable in personam, whenever the defendant could be seized within the state of New Jersey."

The opinion concludes in the following language:

"My conclusion is, that the present action has all the essential characteristics of an action *quasi in rem*, and that the defendant, having been duly notified of the suit so as to give it ample opportunity to appear and make defense therein, will, if it refrains from appearing, be bound by the decree so far as the same relates to the status of the res, and that in such case the defendant cannot maintain that it is deprived of property without due process of law."

The foregoing decision was affirmed by the New Jersey Court of Errors and Appeals, 73 Atl. 249.

In Gassert vs. Strong (Mont.) 98 Pac. 497, the question raised by this writ of error was squarely before the court. It was there expressly stated that an action to establish and enforce a trust in personal property fraudulently obtained is an action *in rem*.

and even though the defendants holding the legal title are non-residents and served by publication only, yet the court has jurisdiction to declare and enforce a trust against them because the subject matter of the trust is within the territorial jurisdiction of the court. The opinion, after pointing out that the fact that the action was in form against the non-resident defendants personally was immaterial, and after reviewing the decisions of the United States Supreme Court already presented in this brief, said:

> "It has been quite generally held that an action to establish and enforce a trust in real estate is a proceeding quasi in rem (Porter Land & Water Co. v. Baskin (C.C.), 43 Fed. 323; Reeves, v. Pierce, 64 Kan. 502, 67 Pac. 1108), and that 'the courts of the state where the trust property is situate have jurisdiction over the enforcement and administration of the trust so far as the property within their jurisdiction is concerned.' 22 Ency. Pl. & Pr. 21. And, again, it is said that a court having jurisdiction of a trust estate does not lose it by reason of the trustee's absence from the state. Pennington v. Smith (C. C.) 69 Fed. 188."

Then after quoting from Loaiza vs. Superior Court (Cal.) 9 L. R. A. 376, quoted supra, the Court continued:

> "From the facts stated in the complaint in this action, it appears that these 5,000 shares of stock are charged with a trust, and it cannot be urged that our courts are powerless to enforce such trust, merely because one of the parties holding the legal title thereto is beyond

the reach of the process of such courts. We think it sufficient to give the court jurisdiction that either the party or the subject-matter of the trust is within the reach of the court. And this appears to be the holding of the courts, Felch v. Hooper, 119 Mass. 52.

"To what class of actions, then did section 610 above, before the amendment of 1907 apply? In the language of the Supreme Court, in Roller v. Holly, 176 U. S. 398, 20 Sup. Ct. 410, 44 L. Ed. 520, we think 'it applies to all cases where under recognized principles of law suits may be instituted against non-resident defendants.' That it was so intended we think is obvious from the general terms in which the section is couched; and, so far as we know the only exception which can be made from the operation of its provisions is in actions in personam, strictly speaking. We are of the opinion that the present action is not such a one, but that it falls within the definition of a proceeding quasi in rem, and that substituted services upon L. M. Strong was sufficient to enable the district court to determine the relative rights of the parties to the stock in question, even though it would not be sufficient to warrant a personal judgment against L. M. Strong himself."

Cases to the same effect might be cited ad infinitum but we have already presented sufficient to reveal the unanimity of judicial opinion on the points in question. It cannot possibly, in view of the many cases cited supra, be contended that the proceedings in the State court were not proceedings *in rem*. The fact that the certificates of deposit were

in Georgia is immaterial. They were mere evidences of the deposits, which were in the Jasper Bank. These deposits consisted, it appears from the copies of the bills of complaint attached to the replications (Transcript, pp. 55 to 61, and 64 to 70), of the proceeds of promissory notes given by the complainants in those suits to the respondent here, and by it delivered to the Jasper Bank, this petitioner. The notes were at all times outstanding and constituted the *res* which was the subject matter of the suits in the State court. And even if we disregard the presence of the notes, and consider the case as merely one of a general deposit, evidenced by certificates of deposit, the *res* would still be in Florida, at the Jasper Bank, being the indebtedness of it to the respondent here. A debt has often been held to be a *res*, such as will support an action *in rem* against it, and its situs for the purpose of administration, is considered to be at the home of the debtor. In the present case, the debtor, Jasper Bank, being within the jurisdiction of the State Court, the debt, the *res*, was also in the jurisdiction.

The Supreme Court of the United States has also held that a debt is a *res*, the situs of which is the domicil of the debtor. See C. R. I & P. R. Co. vs. Sturm, 174 U. S. 810; 43 L. ed. 1144, where it was said:

> "The idea of locality of things which may be said to be intangible is somewhat confusing, but if it be kept up the right of the creditor and the obligation of the debtor cannot have the

same, unless debtor and creditor live in the same place. But we do not think it is necessary to resort to the idea at all or give it important distinction. The essential service of foreign attachment laws is to reach and arrest the payment of what is due and might be paid to a non-resident to the defeat of his creditor. To do it you must go to the domicil of his debtor and can only do it under the laws and procedure in force there. This is a legal necessity, and considerations of situs are somewhat artificial. If not artificial, whatever of substance there is must be with the debtor. He and he only has something in his hands. That something is the *res*, and gives character to the action as one in the nature of a proceeding *in rem*. Mooney v. Buford & George Mfg. Co. (34 U. S. App. 581), 72 Fed. Rep. 32; Conflict of Laws, sec. 549, and notes.

"To ignore this is to give immunity to debts owed to non-resident creditors from attachment by their creditors, and to deny necessary remedies. A debt may be as valuable as tangible things. It is not capable of manual seizure, as they are, but no more than they can it be appropriated by attachment without process, and the power to execute the process. A notice to the debtor must be given, and can only be given and enforced where he is. This, as we have already said, is a necessity, and it cannot be evaded by insistence upon fictions or refinements about situs or the rights of the creditor. Of course, the debt is the property of the creditor, and because it is, the law seeks to subject it, as it does other property, to the payment of his creditors. If it can be done in any other way than by process against and jurisdiction of his debtor, that way does not occur to us."

Since, therefore, the law is settled that a debt is a *res*, the situs of which is the domicil of the debtor, it cannot be contended that in the suits in the State Courts, there was no *res* on which to operate. The debt was the *res*, the debt owing to the plaintiff here by this defendant, Jasper Bank, and the situs of the debt was Hamilton County, Florida, the domicil of the debtor. However, as we have seen, the notes, the specific securities and assets represented by the certificates of deposit were also in the custody of the Jasper Bank and within the State court's undoubted jurisdiction.

This indebtedness the Court adjudicated and enjoined your petitioner from paying it to the respondent, or anyone for it.

The holding in C. R. I. & P. R. Co. vs. Sturm, 174 U. S. 710, 43 L. Ed. 1144, was followed in New York Life Ins. Co. v. Dunlevy, 241 U. S. 521, 60 L. Ed. 1142 where it was held that a State Court could, on garnishment by an execution creditor, require the amount due a non-resident to be determined, and appropriate it to the payment of the judgment, although the non-resident creditor was not in Court.

A very similar case to the case at bar is that of Pennington v. Fourth National Bank, 243 U. S. 269-273; 61 L. Ed. 713, (decided March 6, 1917). In said case Mrs. Pennington brought a suit for divorce, in a State court of Ohio, against her husband, who was a non-resident of Ohio, who was served with process by publication only, and had not voluntarily appeared in the suit. She obtained a valid decree

of divorce. In the same proceeding she sought alimony; and in order to insure its payment joined as a defendant the Fourth National Bank of Cincinnati, in which her husband had a deposit account. When the suit was filed the court entered a preliminary order enjoining the Bank from paying out any part of the deposit. Under later orders of the Court, the Bank made payment from it to the wife. Finally it was perpetually enjoined from making any payments to the husband and ordered to pay the balance to the wife, which it did. The husband then presented to the bank a check for the full amount of the deposit, asserting that the court's orders deprived him of his property without due process of law, in violation of the 14th Amendment. Payment of the check was refused. Thereupon, Pennington brought in another State court of Ohio, an independent action against the bank for the amount. Judgment being rendered for the bank, he took the case by writ of error to the Court of Appeals for Hamilton County, and from there to the Supreme Court of Ohio. Both these courts affirmed the judgment below. Then the case was taken to the Supreme Court of the United States for review, Pennington still claiming that his constitutional rights had been violated.

In the above case and the case at bar service by publication was had on the non-resident defendants. In both cases a resident bank, holding the funds of a non-resident defendant, was made a defendant and personally served with process. In both cases the defendant bank was enjoined from paying the

money to the defendant in whose name the funds were deposited, and was ordered to pay said deposit to the plaintiff. In both cases the deposit in the resident bank, defendant, the debt due the non-resident defendant, was the res adjudicated by the State court. Said deposit was property within the State and in the jurisdiction of the State Court. In both cases the situs of the debt or res is the residence of the defendant, the resident bank. In both cases personal property was involved. In both cases the original suit was by bill in chancery in which the State court entered final decree, in which the resident bank defendant was enjoined from paying the money to the non-resident defendant in whose name the funds were deposited, and was ordered to pay said deposit to plaintiff. Thereafter in both cases, the original non-resident defendant, brought an independent action in another court against the original resident bank, defendant, for the amount of the deposit. Finally, in both cases the entire matter was taken to the Supreme Court of the United States for review.

In the above case, Pennington vs. Fourth Nat. Bank, 243 U. S. 269-273, 61 L. Ed. 713, at page 714, in its opinion the court says:

> "The 14th Amendment did not, in guaranteeing due process of law, abridge the jurisdiction which a state possessed over property within its borders, regardless of the residence or presence of the owner. That jurisdiction extends alike to tangible and to intangible property. Indebtedness due from a resident to a non-resident—of which bank deposits are an ex-

ample is property within the state. Chicago R. I. & P. R. Co. v. Sturm, 174 U. S. 710, 43 L. Ed. 1144, 19 Sup. Ct. Rep. 797. It is, indeed, the species of property which courts of the several states have most frequently applied in satisfaction of the obligations of absent debtors. Harris v. Balk, 198 U. S. 215, 49 L. ed. 1023, 25 Sup. Ct. Rep. 625, 3 Ann. cases 1084. Substituted service on a non-resident by publication furnishes no legal basis for a judgment in personam. Pennoyer v. Neff, 95 U. S. 714, 24 L. ed. 565. But garnishment or foreign attachment is a proceeding quasi in rem. Freeman v. Alderson, 119 U. S. 185, 187, 30 L. ed. 372, 373, 7 Sup. Ct. Rep. 165. The thing belonging to the absent defendant is seized and applied to the satisfaction of his obligation. The Federal Constitution presents no obstacle to the full exercise of this power.

"It is asserted that these settled principles of law cannot be applied to enforce the obligation of an absent husband to pay alimony, without violating the constitutional guaranty of due process of law. The main ground for the contention is this: In ordinary garnishment proceedings the obligation enforced is a debt existing at the commencement of the action, whereas the obligation to pay alimony arises only as a result of the suit. The distinction is, in this connection without legal significance. The power of the state to proceed against the property of an absent defendant is the same whether the obligation sought to be enforced is an admitted indebtedness or a contested claim. It is the same whether the claim is liquidated or is unliquidated, like a claim for damages in contract or in tort. It is likewise immaterial that

the claim is, at the commencement of the suit, in choate, to be perfected only by time or the action of the court. The only essentials to the exercise of the state's power are presence of the res within its borders, its seizure at the commencement of proceedings, and the opportunity of the owner to be heard. Where these essentials exist, a decree for alimony against an absent defendant will be valid under the same circumstances and to the same extent as if the judgment were on a debt, that is, it will be valid not in personam, but as a charge to be satisfied out of any property seized. Cases are cited in the margin.

"The objection that this proceeding was void, because there was no seizure of the res at the commencement of the suit, is also unfounded. The injunction which issued against the bank was as effective a seizure as the customary garnishment or taking on trustee process. Such equitable process is frequently resorted to in order to reach and apply property which can not be attached at law. Cases are cited in the margin.

"Affirmed."

In accordance with the above opinion we maintain that defendant's (petitioner here) seven additional pleas, with exhibits attached (Transcript, pp. 9 to 18 and pp. 18 to 42) to first five counts of plaintiff's (respondent here) declaration (Transcript, pp. 3 to 9) are a complete defense to respondent's cause of action.

We wish to call the attention of this Court to the decision of the Florida Supreme Court in the case

of Rome Ins. Co. vs. Corbett, 63 So. 833 (Transcript, pp. 82 and 83). In that case the same points are involved as are presented by the writ of error to the United States Circuit Court of Appeals. In fact said writ of error amounts in effect to an appeal from the Supreme Court of Florida to said Circuit Court of Appeals, for it is the decision in Rome Ins. Co. vs. Corbett, of which the respondent here really complains. The Court there said:

> "A bill was filed in the Circuit Court for Hamilton County against local defendants and also certain non-resident corporations, seeking to impound a fund in that county arising out of an alleged fraudulent transaction consummated in that county. Constructive service, in perfect accordance with the statute, was had by publication, and the non-resident corporation appeared specially to quash the service upon the theory that the sole relief prayed was in personam, and that therefore the statute authorizing constructive service by publication does not apply. This motion having been denied these non-residents have sued out what they term a special appeal.

and,

> "The bill *confines its prayer to an adjudication of the fund sought to be impounded*, and does not pray for a general personal decree against these non-residents, and we are not to assume upon the face of the bill that the Circuit Court will enter an unauthorized decree; and we have not before us any such question of jurisdiction as was involved in the case of Pennoyer vs. Neff, 95 U. S. 714.

"The purpose of the statute authorizing constructive service by publication is to notify non-residents of the pending suit so that they may if they care to do so, come into the case, and if the statute be followed, there is no right in the non-resident to quash this notice; he has his right if not waived, to object should the Court thereafter commit an error against him.

"Our constructive service statute is broad enough to apply to any suit in equity pending in our Circuit Courts, and as has been said in Kilpatrick v. Post, 53 N. J. Eq. 591, 32 Atl. Rep. 267, cannot be confined in its operation to the cases where the Court might make final decree or judgment. Further that Court says, 'It was not intended that the question of the power to enter the ultimate decree or judgment should enter into the question of the right to give notice of the suit to a non-resident, or that this question of jurisdiction should be settled on a motion to discharge the order of publication. The complainant is entitled to have the question of jurisdiction settled by a final decree.'

"We are not to be understood as holding that the court might not quash a service by publication, if the bill upon its face showed that it was clearly a common law action, and that the resort to the equity side of the Court was a subterfuge; the bill before us does not present that case.

"The order is affirmed." (Italics ours).

The foregoing decision was an adjudication by the Florida Supreme Court that the court, in the proceedings set up in the additional pleas herein, had jurisdiction in the premises. Therefore, under

the rule as laid down in C. R. I. & P. R. Co. vs. Sturm, 174 U. S. 710, 43 L. Ed. 1144, this Court should give "full faith and credit" to the decree.

The theory on which the respondent attacks the validity of the decree set up in the plea in question, is fallacious and unsound, unsupported by reason, justice or authority. This theory is, that according to one of the twelve maxims, equity acts in personam; that the decree set up in the plea is a chancery decree; that, therefore, it must be a personal decree and consequently void for want of personal service. Counsel for respondent contends that in the absence of the statute, equity can only act *in personam* and that no statute in Florida exists authorizing the decree under consideration.

The major premise of respondent's syllogism, viz, that equity acts only in personam, is unsound and its conclusion must necessarily fall with it.

The many cases already cited in this brief in themselves constitute an unanswerable refutation of this theory. They show that equity does act *in rem* in so far as is necessary to justify service by publication. The maxim, "Equity acts only *in personam*, and not *in rem*," is not to be taken too literally. It was a statement made at the time when Chancery jurisdiction was first exercised to allay the jealousy of the common law courts, which feared the usurpation of their powers by the Chancellors. The maxim stated that equity would act *in personam*, on the consciences of the parties, and thus perform a duty impossible for the courts of law to fulfill. However, it was seen, from the necessities of the case, that

equity could not act entirely *in personam,* and although the maxim was retained, and still applies, in a limited sense, yet equity decrees are in a large part, *in rem* and not *in personam.* This is pointed out by all the recognized authorities on equity jurisprudence.

We quote from Vol. 1, Pomeroy's Equity Jurisprudence, (3rd Ed.) Sec. 134-135, as follows:

> "Some writers have argued that the equitable jurisdiction is to be regarded as wholly remedial, and that equity itself does not create any rights of property or other primary rights, because the Courts of Chancery, as they say, only act in personam against the parties and never in rem upon the subject matter of a judicial controversy. It is said that a decree of the court never operates by virtue of its own inherent efficacy to create or to transfer an estate, right or interest; that such decree never executes itself nor furnishes any means or instrument by which it may be executed without the intervention or act of the party against whom it is rendered; that the plaintiff in equity never merely by means of the decree in his favor ever recovers possession of the land or *other subject matter,* or becomes invested with the title to or estate therein; and that the court simply orders some act to be done, a conveyance to be executed, an instrument to be surrendered up and cancelled, possession to be delivered and the like, and then merely uses a moral coercion upon the defendant by means of fine and imprisonment to compel *him* to do what is asked to be done in the judgment. This radical difference between the effect of the de-

> cree in equity and a judgment at law, it is urged, shows that there are no equitable primary rights, no equitable estates or interests distinct and separate from the rights to obtain such remedies as are administered by the Court of Chancery."

After giving the views of some writers in the language above quoted, the same author (Pomeroy) comments on the view as follows:

> "There may be some plausibility in this argument on its surface, but when it is examined with care and under the light of history, all its force disappears. The early Chancellors from prudential motives alone and to avoid a direct conflict with the common law courts, adopted this method of acting, as they said upon the consciences of defendants; and the practice which they invented has with the English national devotion to established forms, continued to modern times. *But it is certainly a complete confounding of the essential facts with the external form to say that such a method of procedure, adopted solely from considerations of policy, determines the nature of the equity jurisdiction and demonstrates the non-existence of any equitable primary rights, estates and interests.* (Italics ours). If there has been any *necessary* connection between the proceedings and remedies of the Chancery and this mode of enforcing its decrees in personam, if it had been intrinsically impossible to render these decrees operative in rem, then the argument would have had some weight but in fact there is no such connection, no such impossibility, and the decrees of the court of equity may be made to

operate in rem to the same extent and in the same manner as judgments at law."

Up to this point in the statement of the law by Mr. Pomeroy, no reference is made to any statutory enlargement of equity jurisdiction. However, he follows the statement just quoted with the further statement, as follows:

"Furthermore, whatever of plausibility there might be in the theory as applied to the English Court of Chancery has been entirely destroyed by the legislation of this Country. The statutes of the several states have virtually abolished the ancient doctrine that the decrees in equity can only act upon the persona of a party, etc."

It is clear, however, from Mr. Pomeroy's exposition as above quoted, that regardless of any statutory enlargement of equity jurisdiction, equity does in fact act *in rem*, as well as *in personam*.

We quote again from Section 429, page 710, Volume 1 Pomeroy, as follows:

"*In what sense equitable remedies do operate in rem:* It has also been shown when explaining the nature of equitable remedies that they generally are in another special sense essentially in rem and not in personam. Equitable remedies very seldom consist of personal judgments, general recoveries payable out of defendant's assets. The fundamental theory of the remedial action of equity is, that it deals with specific and identified land or *chattels* or *specific funds*, whether consisting of securities

and other things in action or of money and it seeks to determine, declare and maintain the estates, interests and rights of the litigant parties in and to such identified lands, chattels, or funds."

In the third edition by the same author in Volume 1, at page 196, it is stated:

"The maxim referred to (that equity acts only in personam) has therefore a very limited application. When we turn from this mere external manner in which equitable remedies were enforced according to the original chancery procedure to the essential, and so to speak, internal nature and qualities of the remedies themselves, instead of their being merely personal, it is one of the distinct and central principles of the equity remedial system that it deals with property rights—estates, interests, liens,—rather than with mere personal rights and obligations of the litigant parties. This tendency of equity to base its remedies upon the rights of property, in their various grades, from complete estates to liens or charges is exhibited in the clearest manner in all its suits brought to enforce the rights and duties growing out of contracts. Although the contract is executory, even though it stipulates only with respect to things not yet in existence,—things to be acquired in the future—the remedial right is worked out by conceiving of a present ownership, interest, lien or charge arising from the executory provisions or a present possibility which will ripen into such an interest, and by establishing this proprietory right, protecting and enforcing it."

And continuing on in the same section, the author clearly demonstrates that equity in a peculiar way deals with rights or interests in property and shapes its relief accordingly without much regard to the personal rights of the plaintiff and the personal obligations of the defendant—or rather by passing over them in its decree.

In Bispham on Equity, the author, after setting forth the maxim that equity acts *in personam*, points out the limitations on its application, and expressly states that equity acts *in rem* where the *res* is in the jurisdiction of the court although the defendant is a non-resident and personal service on him is impossible. At page 75 it is said:

> "The maxim that a court of equity acts in personam must not be understood to mean that the jurisdiction of the chancellor extends to rights of action for personal injuries. The reverse is the case. The subject of the jurisdiction of courts of equity is *property*—not *persons*. Their process is directed against persons and sometimes against property; but there must be some right of property involved in order that the jurisdiction of the court may attach. This subject will be noticed hereafter; but reference may be made in this connection, to the refusal of courts of chancery to entertain any bill to recover damages for purely personal torts.
>
> "It may not be out of place, moreover, to mention here the rule applicable when the res happens to be within the jurisdiction, and the person whose rights in the res are sought to be affected by the decree is a non-resident. In such cases, at all events for certain purposes,

the court will exercise jurisdiction over the thing although personal service upon the defendant may not be possible—whenever service by publication, in lieu of personal service, is authorized by statute. Cases not infrequently arise where it is necessary that the title to real estate should be perfected by getting rid of an outstanding claim. The title to land may be clouded by the existence of an alleged right which the holder declines, presently, to assert. There is, as we shall see hereafter, a jurisdiction in courts of chancery to remove a 'cloud' upon the title. This power may be exercised if the land is within the process of the court, although the party affected may be beyond its limits."

The theory advanced by counsel for plaintiff (respondent here), that equity can act only *in personam;* that consequently it cannot enter a decree *in rem* which can be based on service by publication, is not original. It has many times, in similar cases been offered to the Courts, but in each instance it has met with a cold reception. In Amparo Mining Co. vs. Fid. Trust Co. (N. J.) 71 At. 605, heretofore quoted, the court disposed of the theory as follows:

"In the present case the res is personal property. It does not follow that because anciently an equity decree affecting real estate operated only in personam, and did not proprio vigore transfer or establish title, that such decrees affecting personal property within the jurisdiction of the court were in the same way limited in their practical operation. Assuming that formerly in neither case did the decree

establish title but only the right of the complainant to receive a title, the important distinction still remains that in the case of real estate title did not pass upon delivery of possession, whereas in the case of chattel property it did. Anciently the Court of Chancery would not give to a successful complainant, in a suit for specific performance of a contract to convey real estate, a writ of assistance to put him in possession, because no legal title would be thereby established. The same difficulty does not exist in the case of chattels. The argument to sustain the plea in this case seems to assume that a party complainant, who has obtained a final decree in this court establishing his equitable title to chattels in possession of a defendant holding legal title thereto, and who in pursuance of such decree has actually obtained possession, has no legal title, and will have none until the defendant has voluntarily, or under the compulsion of the court, executed a conveyance. The general principle, I think is now recognized that a bare legal title to chattels cease to exist when the holder of a complete equitable title takes possession for the reason that such possession creates a legal title. Kronson v. Lipschitz, 68 N. J. Eq. 367, 60 Atl. 819 (1904). Such certainly must be the effect of the union of a complete equitable title and possession, when the only right or duty in respect of the chattels remaining in the original holder of the legal title is to convey the same to the holder of the equitable title. Possession of a chattel under a complete equitable title in such a case must make a complete legal title."

There can be no question of the jurisdiction of

courts of Chancery over proceedings such as are disclosed in the pleas under consideration. The cases cited herein where similar decrees have been entered and upheld, amply substantiate this proposition. Equity having jurisdiction as the authorities all show, to declare the trust and adjudicate the title to the funds involved, the State had the power to provide for substituted service against non-residents by publication. The Florida Statute concerning service by publication (Gen. Stat. 1866) (Rev. Gen. Stat. 3111; year 1920) is unlimited. It provides for service by publication in all chancery cases. On page 82 of the transcript we see that the Florida Supreme Court in Rome Insurance Co. vs. Corbett, 63 So. 833, construed this, its own statute, as follows:

> "Our constructive service statute is broad enough to apply to any suit in equity pending in our Circuit Courts."

It is not material to quote the entire section here, as it deals with the mechanism of obtaining service by publication. It commences:

> "Whenever the complainant, his agent or attorney, shall state in a sworn bill or affidavit, duly filed, the belief of the affiant that the defendant is a resident of a state or country other than this state —"

and continues to describe the process of mailing, posting, publishing, etc. The word "whenever" is the only limitation on the operation of the section, and as we have seen, the Florida Supreme Court has held it broad enough to cover any equity action.

So has the United States Circuit Court for the Southern District of Florida. In Morris vs. Graham, 51 Fed. 53, the court said:

> "The general principle of equity gives to the courts of this state powers to investigate questions of cloud of title, with power to quiet the title to lands involved and to remove therefrom alleged liens, and no special statute was required for that purpose. Holland v. Challen, 110 U. S. 15, 3 Sup. Ct. Rep. 495. The state has by statute authorized and provided for publication and service to carry into effect the rights before existing in a court of chancery."

So in this case. The courts of equity have power to investigate fraud, establish and enforce trusts, without any special statutory enactment for that purpose. The State, by its constructive service statute (Gen. Stat. 1866 supra) (Rev. Gen. Stat. 3111; year 1920) has authorized service by publication to carry into effect the rights and powers of its Chancery courts.

The Supreme Court of the United States has passed upon this contention in Arndt vs. Griggs, 134 U. S. 316, 33 L. ed. 918, which concerned the powers of a Chancery Court to clear title to land within its jurisdiction when the defendant was a non-resident served by publication. It was held that the State has control over the property within its borders and could provide, as by service by publication, reasonable methods of imparting notice to non-residents. The Court said:

> "The propositions are, that an action to

quiet title is a suit in equity; that equity acts upon the person; and that the person is not brought into court by service by publication alone.

"While these propositions are doubtless correct as statements of the general rules respecting bills to quiet title, and proceedings in courts of equity, they are not applicable or controlling here. The question is not what a court of equity, by virtue of its general powers and in the absence of a statute might do, but it is, What jurisdiction has a State over to titles to real estate within its limits, and what jurisdiction may it give by statute to its own courts, to determine the validity and extent of the claims of non-residents to such real estate? If a State has no power to bring a non-resident into its courts for any purposes by publication, it is impotent to perfect the titles of real estate within its limits held by its own citizens; and a cloud cast upon such title by a claim of a non-resident will remain for all time a cloud, unless such non-resident shall voluntarily come into its courts for the purpose of having it adjudicated. But no such imperfections attend the sovereignty of the State. It has control over property within its limits and the condition of ownership of real estate therein, whether the owner be stranger or citizen, is subject to its rules concerning the holding, the transfer, liability to obligations, private or public, and the modes of establishing titles thereto. It cannot bring the person of a non-resident within its limits — its process goes not out beyond its borders — but it may determine the extent of his title to real estate within its limits; and for the purpose of such determination may

provide any reasonable methods of imparting notice."

To the same effect is Grannis vs. Ordean, 234 U. S. 385, 58 L. ed. 1363.

In these two cases the property concerned was real estate, but the reasoning of the opinions applies equally well to personal property. The State has undoubted jurisdiction over property within its borders. Its courts of equity have equally undoubted jurisdiction to establish and enforce trusts and to relieve from fraud. Therefore a decree establishing and enforcing a trust resulting because of a fraud, in personal property within its jurisdiction is valid even though non-residents claim title to such property, if, as in this case, proper notice by publication is given, as provided by statute. Every authority and every case cited in this brief refutes the theories of counsel for plaintiff and shows beyond question that the decree set up in the plea under consideration is valid.

In Rothschild vs. Knight, 184 U. S. 341, 46 L. ed. 580, 22 Sup. Ct. 393, it was held that an insolvent's assignee may seize by trustee process a debt due a non-resident defendant, which is alleged to be a fraudulent preference.

This principle was again stated in King vs. Cross, 175 U. S. 399, 20 Sup. Ct. 132, 44 L. ed. 213, which held:

"A garnishment of a resident debtor to reach a debt due to a non-resident defendant *who has no property subject to the jurisdiction*

> *of the Court*, does not deprive him of property without due process of law." (Italics ours).

In the light of the foregoing decisions there can be no question but that the Circuit Court of Appeals erred when it decided (Transcript p. 121):

> "There being no *res* in the control of the Circuit Court of Hamilton County, jurisdiction was not conferred on that court over non-resident defendants by substituted or constructive service."

There *was* a *res*, and it was in the control of the Court. The deposits, the original notes for which the certificates had been issued, were still unpaid and in the possession of The Bank of Jasper, in Forida. They, in themselves constituted the *res*. But in addition there was the *indebtedness* owing by the Jasper bank to the respondent. As the Circuit Court of Appeals said in its opinion (Transcript p. 124), the certificates of deposit created the same liability on the maker as imported by a promissory note. It was on this indebtedness, which the Circuit Court admitted existed, that the jurisdiction of the State Court was based.

The proceedings were not strictly garnishments, but they were analogous thereto. The debtor was within the control and jurisdiction of the Court. A dispute arose as to how the indebtedness should be administered. The complainants in the State Court claimed that the debt should be paid to them, instead of to the respondent. This is essentially the theory of garnishment. The situs of the debt being

at the home of the debtor, as held in the cases cited *supra*, that is, in Hamilton County, Florida, the Circuit Court of that county had jurisdiction to administer the rights and claims thereto without obtaining personal service on the non-resident creditor.

The proceedings, while not strictly *in rem*, which are proceedings directly against property itself, are yet actions *in rem* in the broader and more general sense, which includes actions where no preliminary seizure is made, but the purpose of which is solely to try the right of title to property or indebtedness within the Court's jurisdiction. This class of actions is often designated as proceedings *quasi in rem*, but they partake of all the characteristics of, and are really, actions *in rem*.

Pennoyer vs. Neff, 95 U. S. 714, 24 L. ed. 565.

Freeman vs. Alderson, 119 U. S. 185, 30 L. ed. 375.

1 Ruling Case Law 328.

Aside from the fact that the proceedings in the State Court were proceedings *in rem*, and jurisdiction of the person of non-resident defendants was unnecessary, there is the further consideration, already pointed out, that in the suits in question, the Court did have jurisdiction over the person of respondent, because by appealing to the Florida Supreme Court, it in effect entered a general appearance.

D—THE DECREES ENTERED IN THE STATE COURT CONSTITUTED A COMPLETE DEFENSE TO THIS ACTION BROUGHT IN THE FEDERAL COURT.

Petitioner in the trial court, in this action brought on the certificates of deposit, properly pleaded the decrees entered in the State Court declaring the certificates void. (Transcript pp. 9 to 18). The Circuit Court of Appeals, in deciding that the trial court erred in overruling respondent's demurrer to the pleas, held that the decrees constituted no defense because: (1) the State Court had no jurisdiction in entering the decrees, (Transcript pp. 120 to 122); and (2) the effect of the decrees, even if the State Court had jurisdiction, was not to declare them absolutely void, (Transcript pp. 122 to 124).

We have already shown that no question of jurisdiction of the State Court can be raised, because in the first place, the proceedings were *in rem* and personal service was not necessary; and in the second place, had jurisdiction of respondent's person been necessary, the State Court had it by reason of the fact that respondent conferred jurisdiction over its person by availing itself of the Court's jurisdiction and prosecuting an appeal.

Turning now to the final ground of the Court of Appeal's decision, we see that the effect of the decrees was in fact to declare the certificates of deposit absolutely void, and they undoubtedly constituted a perfect defense to the action on the certificates.

We first wish to point out that it was not proper for the Circuit Court of Appeals to consider the question of the *effect* of the decrees. That question was not before it. The only question before it was the *validity* of those decrees, which validity turned on the question of the State Court's jurisdiction. The effect of the decrees, if valid, was in effect *admitted* to constitute a defense, for no question on that score was raised. The only objection raised by respondent in the trial court to the sufficiency of the decrees as a defense, was the claim that the decrees were void because they were entered by a court having no jurisdiction. It was not proper for the appellate court to consider objections not raised by the parties in the trial court. Its only power was to review the questions raised and passed upon in the lower court, and not to consider the pleadings *de novo.*

The only pleadings before the Circuit Court of Appeals were petitioner's pleas of *res adjudicata* and respondent's demurrer and replication to those pleas. In none of these pleadings was it contended that the effect of the decrees, if valid, was not to bar the action. The only objection raised to the pleas by respondent's demurrer and by its replications, was that the decrees were entered in suits *in personam,* and that the State Court in those suits had no jurisdiction over the person of the respondent. This was the only question raised by the pleadings. It was the only question argued by the parties. It was the only question which should have been considered by the Court of Appeals.

It is true, that the first ground of respondent's demurrer to the pleas, (Transcript p. 42) was that the plea "sets up no defense to the cause of action alleged in said count." This general ground of demurrer under the practice in Florida, which governed the trial court under the Conformity Act, is a nullity. It amounts merely to a repetition of the demurrer and calls nothing to the attention of the Court.

The Supreme Court of Florida, in Heathcote vs. Fairbanks-Morse Co., 60 Fla. 97, 53 So. 950, held:

> "A ground of demurrer to a plea that the same 'fails to state any sufficient defense to the plaintiff's cause of action' in effect merely repeats such demurrer and avers that such plea is bad in substance and is not a compliance with the statute requiring the substantial matters of law to be argued to be stated."

All the other grounds of the demurrer were directed to the jurisdiction of the State Court in entering the decree, and the replications (Transcript pp. 45 to 98) were devoted entirely to the same objection. Therefore, the effect of the decrees, if valid, was never raised in the trial court, and should not have been considered by the Circuit Court of Appeals.

The rule concerning the necessity of making objections in the trial court in order that they may be made in an appellate court is well stated in 3 Corpus Juris, 892, where it is said:

> "Only objections or grounds of objection urged in the trial court will be considered on

appeal. The party will not be permitted to change them or add others. The appellate court is not a forum in which to discuss new points, but merely a court of review to determine whether the rulings of the court below, *as presented,* were correct or not." (Italics ours).

In the case of Belk vs. Meagher, 104 U. S. 279, 26 L. ed. 735-739, at page 739, the Court said:

> "Nothing which occurred in the progress of the trial below can be assigned for error here which was not brought to the attention of the court and decided by it."

As this Court said in Robinson & Co. vs. Belt, 187 U. S. 41, 47 L. ed. 65:

> "*While it is the duty of this court to review the action of subordinate courts, justice to those courts requires that their alleged errors should be called directly to their attention, and that their action should not be reversed upon questions which the astuteness of counsel in this court has evolved from the record. It is not the province of this court to try these cases de novo.*"

An examination of the transcript of the record in the cause reveals that question as to the sufficiency of decrees as a defense, if valid, was never raised by the parties. Except as to their legality, no objection was made to them. The only place in the record where their effect, as a defense, granting their legality, was even suggested, appears in the opinion of the Circuit Court of Appeals.

In the case of Wood vs. Weimar, 104 U. S. 786, 26 L. ed. 779-782, at page 782, the court said:

> "The rule is universal that nothing which occurred in the progress of the trial can be assigned for error here, unless it was brought to the attention of the court below, and passed upon directly or indirectly."

In the case of Bort vs. E. H. McCutchen & Co., 187 F. 798, 109 C. C. A. 558, decided by the United States Circuit Court of Appeals for the Eighth Circuit, the court in effect holds:

> "A writ of error presents for review nothing but the alleged errors of law into which the court below has fallen, and a contention which was never presented to nor ruled upon by that court is not before the appellate court for consideration or decision."

Besides being improper, the action of the Court of Appeals in deciding against the effect of the decrees as defenses, was erroneous. The decrees constitute an absolute defense to this action on the certificates of deposit.

By the decrees pleaded, (Transcript pp. 18 to 42) it appears that the certificates of deposit concerned had been issued to cover and include the proceeds of certain notes executed by the complainants in the suits in the State Court. The State Court decreed:

(a) That the proceeds of the notes belonged to the complainants.

(b) That the American Bank and Trust Company had no right, title, interest, claim, or demand of, in and to the proceeds of said notes.

(c) That the defendant Bank of Jasper (petitioner here) be directed to pay the proceeds of the note to the complainants in those suits.

(d) That the certificates of deposit, in so far as they covered the proceeds of the note were void, and of no effect.

There being no question as to the jurisdiction of the State Court to enter the decrees, suits could not be maintained on the certificates of deposit after the decrees were entered. The question of the petitioner's liability on the certificates was *res adjudicata*. It had already been compelled to pay the amounts represented thereby to persons other than the respondent, and respondent was specifically decreed to have no interest therein or right thereto.

What better defense to the action in the lower court could be conceived, than the existence of these decrees. It is a fundamental principle that matters should be litigated but once, and once a competent court has passed on questions in dispute, they must be forever at rest.

But the Circuit Court of Appeals took it upon themselves (although respondent was content with the effect of the decrees if valid, and only asked that Court to pass upon the question of their validity) to decide that the decrees were insufficient as a defense because they merely established the fact that the non-residents had no right in the "supposed" fund in the Jasper Bank, and did not hold that the Jasper Bank was not personally liable on the certificates.

But the decrees *do* pass on the personal liability

of the Jasper Bank on the certificates of deposit. The certificates represented the proceeds of certain notes, and the Jasper Bank was enjoined from paying those proceeds—in other words the amounts of the certificates to the First National Bank of Rome, *or to anyone for it*, (Transcript, pp. 18 to 42). Is this not an adjudication that the Bank of Jasper should not be liable on the certificates to American Bank and Trust Company or its endorsees?

The decrees further adjudge that the certificates of deposit are *void and of no effect*. Is not this an adjudication that the Bank of Jasper should not be personally or otherwise liable thereon? How can one be liable on a void instrument—on something that has no existence?

But the Circuit Court of Appeals said the decrees did not declare the certificates void absolutely, but only in so far as they covered and included the proceeds derived from the notes (Transcript, p. 123). *But there is nothing to show that the entire amount of the certificates did not represent the proceeds of the notes.*

It is true the decrees adjudge the certificates void only in so far as they covered and included the proceeds of the notes, but the record shows that the entire amount of the certificates consisted of the proceeds of the notes. The certificates were issued to cover such proceeds and there is absolutely no showing made that one cent of the amount represented by the certificates consisted in anything other than such proceeds.

If, as a matter of fact, only a part of the amounts

represented by the certificates consisted of the proceeds of the note, and if a part of the amount consisted of other deposits, *it was incumbent on the respondent to show it.* The petitioner's pleas of *res adjudicata* (Transcript, pp. 9 to 18) allege that the certificates of deposit *represent and cover* the proceeds of the notes mentioned in the decrees. This allegation is not denied. The replications of respondent (Transcript, pp. 45 to 98) do not say that the certificates only partially cover the proceeds of the note. They are concerned only with the jurisdiction of the Court in entering decrees and by their silence, admit that the certificates represented the proceeds of the notes and that therefore the decrees adjudged them totally void and of no effect.

As the pleadings show that the certificates cover only the proceeds of the notes, they show, therefore, that the certificates were declared absolutely null and void. No action could, therefore be maintained on them and the decrees pleaded constituted perfect defenses to the action.

CONCLUSION

We believe that it has been clearly demonstrated that the Circuit Court of Appeals erred in its decision of this case, and that the decree of the District Court was proper, the latter being in consonance with the decision of the Supreme Court of Florida, for the following reasons:

1. The proceedings in the State Court were

proceedings *in rem* and jurisdiction over the person of the non-resident defendant was not necessary.

2. The prosecution of an appeal under the Florida practice constitutes a general appearance.

3. The State Court had jurisdiction over the person of the respondent by reason of its voluntarily availing itself of the State Court's jurisdiction to prosecute appeals therein.

4. The only question before the Circuit Court of Appeals was the one of the State Court's jurisdiction to enter the decrees pleaded.

5. The effect of the State Court's decrees was to declare the certificates of deposit absolutely void and to bar further action thereon.

We submit that the judgment of the United States Circuit Court of Appeals for the Fifth Circuit should be reversed; and that the judgment of the United States District Court for the Southern District of Florida should be sustained.

Respectfully submitted,

F. P. FLEMING,
Attorney and of Counsel for Petitioner.

FILE NO. 27,740

IN THE

Supreme Court of the United States

October Term, 1920

No. 383

THE BANK OF JASPER,
A CORPORATION,

Petitioner,

vs.

THE STATE BANK OF ROME,
A CORPORATION.

Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION TO APPLICATION FOR CERTIORARI

HENRY C. CLARK,
Attorney and Counsel for Respondent.

W. E KAY,
J. L. DOGGETT,
Of Counsel.

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IN THE

Supreme Court of the United States

THE BANK OF JASPER,
A CORPORATION,
Petitioner.

VERSUS

THE STATE BANK OF ROME,
A CORPORATION.
Respondent.

October Term,
1920

No. 383.

BRIEF FOR RESPONDENT IN OPPOSITION TO APPLICATION FOR CERTIORARI

STATEMENT OF THE CASE

Since petitioner's brief contains no statement of the case, except as might be incompletely gleaned from the petition for writ of certiorari, we present such statement, which includes certain important facts not mentioned in the petition.

This is a purely private controversy in which no final judgment has been rendered. Under the decision of the Circuit Court of Appeals, this case awaits trial in the District Court. Furthermore, when this case is sent back to the District Court for trial, there are a number of pleas and replica-

tions which were withdrawn under stipulation, but which petitioner may then refile (R. 87).

This is a common law action in which the respondent bank, a foreign corporation citizen of Georgia, seeks to recover from the petitioner bank, a citizen of Florida, upon the several certificates of deposit described in and attached to the several counts of respondent's declaration (R. 5).

There is but one plea to each count at present standing in the record (R. 87). This plea sets up a purported decree of the State Circuit Court of Hamilton County, Florida, in Chancery, which decree attempts to cut off respondent's rights in and to the certificates of deposit sued on in the respective counts (R. 9). Respondent demurred to this plea contending that it was bad because the decree therein set forth was based on mere constructive service of process and yet the decree sought to operate *in personam*, (R. 23). The District Court over-ruled this demurrer (R. 26). In so doing the District Court rendered an opinion in the case of *First National Bank of Jasper, Florida vs. The First National Bank of Rome, Georgia*, (No. 372), which is found at page 42 et seq. of the transcript of record in that case.

Respondent filed one replication to petitioner's plea to each count (R. 28). This replication sets forth in detail every step of said chancery suit in the Florida State Courts in so far as respondent in any way participated therein, and shows the total invalidity of said decree attempting to cut off respondent's rights. Petitioner demurred to this replication which demurrer was sustained (R. 84). The District Court in sustaining this demurrer announced that "the questions attempted to be raised

by these replications are questions passed upon by this Court in its ruling upon the demurrer to the pleas. I adhere to the ruling then made." (R. 86)

There was and could have been no showing in said chancery suit that respondent foreign corporation bank was doing business in Florida, or had any representative in Florida upon whom service was or could have been made. The only semblance of service of process was by publication.

Looking at the proceeding in said chancery suit as set forth in said plea and replication, it is seen that both the original and amended Bills of Complaint therein, by their very allegations, preclude any contention that said equity suit was *in rem*, for in both of said Bills it was distinctly alleged that said certificate of deposit was void, and the Bills prayed for a decree declaring the certificate of deposit to be void (R. 36, 50); that every pleading or other paper of any kind filed by the respondent in said chancery suit was limited and recites that the respondent was "not appearing generally but appearing specially, solely and only and limiting this appearance to what in contemplation of law amounts only and solely to a special appearance;" that respondent filed two motions to quash the attempted service upon it, the second motion being filed after an amendment to the bill of complaint; each of these motions were denied; that thereupon "special appeals" were sued out in two chancery cases, and stipulations filed in fourteen other chancery cases that the decision of the Florida Supreme Court in the two cases should be decisive of the validity of the service in the fourteen cases, *but that the stipulations shall not be considered as constituting a general appearance;* (that there were sixteen chan-

cery cases in all will appear by an examination of the four transcripts now before this Court in the instant and its three companion cases); a second stipulation was entered into in the chancery cases which further emphasizes that these special appeals did not constitute a general appearance, this second stipulation being appended to the notice of application for supersedeas and reading "We agree that this notice shall in no sense operate as a general appearance in the above case;" and is signed by the then counsel for complainant (R. 65); that after the ruling of the Supreme Court of Florida, no further participation was taken by respondent in said chancery cases; that nevertheless the Florida Circuit Court proceeded to enter a final chancery decree purporting to take away valuable rights of the respondent.

The United States Circuit Court of Appeals reversed the District Court.

Petitioner asserts a conflict between this decision and the decision of the Florida Supreme Court in *Rome Insurance Company et al. v. J. H. Corbett*, 66 Fla. 438, and upon such assertion applies to this United States Supreme Court for a writ of certiorari.

Respondent (1) denies that such conflicts exist and (2) contends that even if the asserted conflict were a fact, it would be of such nature that the Federal Court would exercise its own independent judgment.

We shall (1st) determine the nature of the State Court suits, (2nd) analyze the asserted conflict between the Federal and State Court, and (3rd) consider whether a cetriorari should be granted.

ARGUMENT

I.

THE STATE COURT SUITS WERE NOT IN REM

A. No Res Existed, Under Allegations of Bill.

Counsel for petitioner, First National Bank of Jasper, contents himself with claiming that the State Court suits were merely "*quasi in rem.*" (Mr. Hampton's brief p. 17. See also Mr. Fleming's brief p. 19). Counsel for petitioner, Bank of Jasper, admits that the alleged *res* was "a supposed indebtedness," (Mr. Fleming's brief p. 13).

This "supposed indebtedness" is the only simulation of a *res* that the ingenuity of petitioner's counsel has been able to evolve. Petitioner could go no further, for *if anything stands out conspicuously in the State Court cases it is the denial of this indebtedness.* This denial appears in the original bill, the amended bill, and in the decree of the State Court. Petitioner is estopped from asserting anything but that the "supposed" *res* was nonexistent.

Petitioner's counsel refer to many cases of attachment and of garnishment. In such cases, the indebtedness attached or garnished is real—does actually exist. If the indebtedness attached or garnished turns out to be merely a "supposed indebtedness," there is nothing to attach or garnish and the attachment or garnishment fails.

There must be a "real, not an imaginary" *res* to furnish the base for a proceeding *in rem*.

> *Chase v. Wetzlar*, 225 U. S. 79, 89, 56 L. Ed. 990, 995.

The counsel now representing petitioner were not counsel in the State Court cases, nor during the earlier stages of the present suit. When these counsel came into this case, respondent was vigorously and affirmatively asserting the validity of its certificates of deposit, and its right to collect thereon. As a consequence, the present counsel for petitoner have not been able to look at the State Court cases through the eyes of one who prepared them, fought through them and claimed from the start that respondent's certificates of deposit were void. *PETITIONER'S COUNSEL* claim the certificates of deposit are void by virtue of the State Court decree. *THEIR CLIENTS* claimed these certificates of deposit were void from the moment the first bill was filed in the State Court. This original claim removes and destroys even the possibility of there being a *res* in the State Court cases.

Petitioner cannot blow hot and cold. *Allegans contraria non est audiendus.* It cannot both affirm and deny. It cannot deny an indebtedness or *res* in the State Court, and, under the same facts, avow an indebtedness or *res* in the Federal Court. We have here an estoppel by record. Petitioner made his bed in the State Court and must lie on it. Changing counsel will not enable petitioner to transform a denial into an affirmative.

In *Davis v. Wakelee* 156 U. S. 680, 39 L. Ed. 578, this Court said:

"When a party assumes a certain position in a legal proceeding and succeeds in maintaining that position, he may not thereafter, simply because his interests have changed, assume a contrary position."

To this point see also:

Brooklyn City & Newtown Railroad Company v. National Bank of the Republic, 102 U. S. 14, 26 L. Ed. 61,
Daniels v. Tearney 102 U. S. 415, 26 L. Ed. 187,
Pease v. Rathbun-Jones Engineering Company, 243 U. S. 273, 61 L. Ed. 715,
Norfolk Southern Railway Company v. Chatman 244 U. S. 276, 61 L. Ed. 1131.

Counsel have failed to show any sort of seizure, attachment, sequestration or impounding of even the "supposed indebtedness" by the State Court. There was none. To stretch out the hand to seize a "supposed" *res* leaves the hand empty. But the State Court did not even reach out its "strong arm."

In *Loiza vs. Superior Court of San Francisco*, 85 Cal. 11, 20 Am. St. Rep. 197, 9 L. R. A. 376, the case principally relied upon by petitioner as a precedent for the State Court suits, and the case referred to in the opinion of the District Court (R. 44 of case No. 372), a receiver was appointed who actually took possession of certain property. No receiver was prayed for in the instant case, and for good reason. What funds could a receiver have identified and taken charge of as representing this "supposed indebtedness?" Certainly it is not to be thought that the petitioner bank had

segregated a specific lot of funds with which to meet payment of the obligation to respondent due "in current funds." And had petitioner done this, it could not thereby affect respondent's rights under its certificates of deposit.

The real and only purpose of the State Court suits as against this respondent was to cancel and decree to be void the certificates of deposit herein sued upon (see third ground of petition for certiorari). In the absence of any showing to the contrary, it will be presumed that these certificates of deposit were in the possession of respondent in its banking house in Georgia. Yet when this foreign corporation bank comes into the United States Court to collect upon these certificates, it is met by a State Court decree purporting to adjudicate that it holds merely a void scrap of paper.

In *Stockbridge v. Phoenix Mutual Life Insurance Co.*, 193 Fed. 558, 559-560 (Dist. Ct., D. Conn.), the court had before it a bill as novel as the bills filed in the Florida court, and regarding this bill the Federal Court pertinently said:

> "The petitioner has presented a very clever bill ————. The court ———— is bound to dissect and analyze, so that it may learn what is the real nature of the bill."
>
> "The absent defendant has, in law, a claim against the insurance company as the beneficiary under the two policies. The policies are merely statements on paper of what the contract was. The conditions precedent in the contract have been fulfilled, and payment on the contract is due. Is the claim a tangible, fixed, definite, and certain thing, with its situs here? It strikes me that Mrs. Ring-

> walt can assert and enforce her claim against the insurance company without coming into this district. It is a claim which, from its inherent nature, is transitory, attaches to her person, and can be taken with her wherever she goes. It is like the contents of a handbag, in which she might carry the usual accessories of a journey. She is no more constrained to come to Hartford to make use of her claim than she would be to use the contents of the handbag. It is a thing subject to constant shifting, changing, and uncertainty. That the policies may have been within the district when the suit was brought was immaterial. She could press her claim in another forum in spite of their presence here. The papers upon which the contracts of insurance are written are not the essence of the contention which this suit presents."

The State Court suits are an anomaly. They are a patent attempt by local citizens to rush into a local State Court and attempt to destroy past due negotiable instruments held by citizens of another State. The only case even slightly in point which counsel have been able to cite in support of their right to do this is *Loaiza v. Superior Court of San Francisco, supra,* but in that case, the notes, mortgages and gold coin in suit were within the jurisdiction of the California court and taken into custody by a receiver, under direction of a court order. Here the certificates of deposit were in Georgia and the indebtedness represented thereby asserted in the bills of complaint to be void. No court has ever held that such a suit was *in rem.*

B. Equity Acts In Personam.

The fact that respondent claims the right to collect its certificates of deposit out of "current funds" of petitioner did not authorize a decree against respondent upon mere constructive service, assuming for the moment that "current funds" could constitute a *res*. While only the certificates of deposit issued by the First National Bank of Jasper used the language "payable in current funds," yet this necessarily is all that the certificates issued by the Bank of Jasper could call for. No special fund was created, and certainly neither bank intended to or did set aside and keep idle a specific fund as represented by these certificates of deposit.

These State Court cases were in a court of equity.

Equity is a court of conscience. Its attention is directed primarily to the duty of the defendant, and it vindicates the right of the plaintiff through compelling the defendant to fulfill his co-relative duty, ordering him to do the very act he is under obligation to do, or to refrain from the very act he is under obligation not to do. Hence the maxim "Equity acts *in personam*."

While this power to act *in personam* upon the defendant in many ways enlarges the ability of the Chancellor to effect redress for the plaintiff, it also constitutes a specific limitation in other ways upon the jurisdiction of the Chancellor.

At no time throughout this litigation, has it been contended by the other side that any statute of Florida authorizes a chancellor to proceed *in rem* as against personal property. Furthermore in Florida, the courts have not developed by a

species of judicial legislation, any sort of spurious doctrine that will authorize a chancellor to act and adjudicate *in rem*, except where such authority is given him by statute.

Therefore, with neither a Florida statute nor a Florida decision authorizing a chancellor to act *in rem* in this case, it is not to be expected that this United States Supreme Court will undertake judicially to legislate regarding the powers of a court of equity in Florida.

The State Court suits are as closely analogous to a bill to remove a cloud on title as to any known form of procedure. It is settled that such a suit, in the absence of a statute, is *in personam*, and a non-resident defendant served merely constructively is not bound by a decree therein entered; *Hart v. Sansom*, 110 U. S. 151, 28 L. Ed. 101.

In *Boswell's Lessee v. Otis, et al.*, 9 How. 336, on page 350, 13 L. Ed. 164, 170, this Court said:

> "No principle is more vital to the administration of justice, than that no man shall be condemned in his person or property without notice, and an opportunity to make his defence. And every departure from this fundamental rule, by a proceeding *in rem*, in which a publication of the notice is substituted for a service on the party, should be subjected to a strict legal scrutiny. *Jurisdiction cannot be assumed and exercised in such cases upon the general ground, that the subject matter of the suit is within the power of the court.*" (Italics ours).

The leading case of *Baldwin v. Hale*, 1 Wall. 223, 234, 17 L. Ed. 531, holds, as stated in the opinion, page 534:

> "Insolvent laws of one state cannot discharge the contracts of citizens of other states, because they have no extra-territorial operation, and consequently the tribunal sitting under them, unless in cases where a citizen of such other state voluntarily becomes a party to the proceeding, has no jurisdiction in the case. *Legal notice cannot be given* and, consequently, there can be no obligation to appear, and of course there can be no legal defaults." (Italics ours).

An action for specific performance cannot, in the absence of a statute, be maintained by the courts of the State in which the property is located, against a non-resident served only constructively.

> *Hollingsworth v. Barbour*, 4 Peters 466; 7 L. Ed. 922;
> *Texas Company v. Central Fuel Oil Co.*, 194 Fed. 1 (CCA 8th Cir).
> *Snell v. Hill*, 263 Ill. 211, 105 N. E. 16;
> *Homer v. Ellis*, 75 Kan. 675; 90 Pac. 275; 121 Am. St. Rep. 446;
> *Spurr v. Scoville*, 3 Cush. 578;
> *Silver Camp Mining Co. v. Dickert*, 31 Montana 488; 78 Pac. 967; 67 L. R. A. 940; 3 Ann. Cas. 1000.

We would also refer to the valuable discussion of the nature of equity decrees found in *Langdell's Equity Pleading*, 2nd. Ed. Sections 42 and 43, also note appended to Section 42, and found on pages 35 to 38, also Section 184. See also the clear discussion in *10 R. C. L.* 364 and 387.

An injunction operates only *in personam: Hitch-*

man Coal & Coke Co. v. Mitchell, 245 U. S. 229; 62 L. Ed. 260.

The nature of an interpleader suit is particularly noteworthy in determining the validity of the decrees of the Florida State Court. In an interpleader suit, the complainant places an actual specific fund in the very lap of the Court, and prays its adjudication as between the interpleaded defendants. Here might seem to be a *res*. But it is uniformly recognized that a non-resident defendant served only by publication is not bound by a decree which undertakes to cut off his rights:

New York Life Ins. Co. v. Dunlevy, 241 U. S. 518, 521; 60 L. Ed. 1140, 1142;
Bell v. Gunn, 94 Ga. 642; 21 S. E. 899;
Gary v. Northeastern Masonic Aid Assn. (Iowa), 50 N.W. 27;
Tremblay v. Aetna Life Ins. Co., 97 Me. 547; 55 Atl. 509; 94 Amer. St. Rep. 521;
Expressmen's Mutual Benefit Assn. v. Hurlock, 91 Md. 585; 46 Atl. 957; 80 Amer. St. Rep. 470;
Scharmann v. Union Pac. Ry. (Minn.) 175 N. W. 554;
Ward v. Bankers Life Co. 99 Neb. 812; 157 N. W. 1017;
Cross v. Armstrong, 44 Ohio State 613; 10 N. E. 160;
Washington Life Ins. Co. v. Gooding, 19 Tex. Civ. App. 490; 49 S. W. 123.

Cross v. Armstrong, supra, is an especially strong and well-reasoned case, and has been twice approved by this Court. In *Leigh v. Green*, 193 U. S. 79, 48 L. Ed. 623, 628, this Court said:

"When the proceedings are *in personam* the

> object is to bind the rights of persons, and in such cases the person must be served with process; in proceedings to reach the thing, service upon it and such proclamation by publication as gives opportunity to those interested to be heard upon application is sufficient to enable the court to render judgment. *Cross v. Armstrong*, 44 Ohio St. 613, 624, 10 N. E. 160."

Again, a still more important acceptation by this Court of the principles announced by the Ohio Court is found in *New York Life Insurance Co. v. Dunlevy*, 241 U. S. 518, 60 L. Ed. 1140, 1142, as follows:

> "The interpleader initiated by the company was an altogether different matter. *This was an attempt to bring about a final and conclusive adjudication of her personal rights*, (Italics ours), not merely to discover property and apply it to debts. And unless in contemplation of law she was before the court, and required to respond to that issue, its orders and judgments in respect thereto were not binding on her. *Pennoyer v. Neff*, 95 U. S. 714, 24 L. Ed. 565; *Shinn, Attachment & Garnishment*, Sec. 674. See *Cross v. Armstrong*, 44 Ohio St. 613, 623, 625, 10 N. E. 160."

A situation quite similar to the present case was passed upon in *Aetna Life Insurance Co. v. Lyon County*, 95 Fed. 325, at page 331, where it is said:

> "Much reliance is placed by the defendant upon a decree rendered in a case entitled *Anderson v. Insurance Co.* (Iowa) 55 N. W. 348, by the district court of O'Brien County, Iowa,

and affirmed on appeal by the state supreme court, which was a proceeding in equity brought by certain residents and taxpayers of O'Brien county to restrain the county treasurer from making any payments on the bonds negotiated by R. L. Richards, and to have the bonds adjudged to be illegal and non-enforceable, and in which case a decree to that effect was entered. It is shown upon the record that in that case service of the original notice therein was not had upon any one of the complainants within the state of Iowa, they being all residents of other states, and no appearance therein was entered for any of the complainants except the Orient Fire Insurance Company, and therefore the decree therein is of no force against any of the complainants, except the Orient Company; it being well settled that, in personal actions, the service of notice by publication, or by reading the process to the party, at a place outside of the territorial jurisdiction of the court, confers no jurisdiction over the party thus served. *Pennoyer v. Neff*, 95 U. S. 714; *Hart v. Sansom*, 110 U. S. 151, 3 Sup. Ct. 586. The adjudication in that case had no effect upon the rights of any of the complainants herein, except the Orient Company."

In *Brooklyn v. Aetna Life Insurance Co.*, 99 U. S. 362, 25 L. Ed. 416, Justice Harlan speaking for the Court said:

"The suit commenced and determined in the Circuit Court of Lee County was a proceeding wholly *in personam*, against the holders and owners of bonds and coupons which had been issued in the name of the Town, and delivered to the Railroad Company. Upon principle and authority, no decree therein rendered

could bind anyone not personally served with process, or who did not appear. It could not affect the rights of non-resident holders of bonds and coupons, proceeded against by constructive service. Such service, as to them, was ineffective for any purpose whatever. *Pennoyer v. Neff*, 95 U. S. 714, and authorities there cited."

To the same effect see:

Township of Empire v. Darlington, 101 U. S. 87, 25 L. Ed. 878.
Pana v. Bowler, 107 U. S. 529, 27 L. Ed. 424.

In two decisions, this Court has pointedly stated that "the foundation of jurisdiction is physical power:"

McDonald v. Mabee, 243 U. S. 90, 91, 61 L. Ed. 608, 609.
In the matter of Indiana Transportation Co., 244 U. S. 456, 457, 61 L. Ed. 1253, 1255.

Hence it follows that where the jurisdiction is *in personam*, such jurisdiction cannot exist unless founded on power over the person.

We submit that the Hamilton County Circuit Court was wholly lacking in power to enter a decree adjudicating respondent's rights under the certificates of deposit herein sued upon.

II.

NO CONFLICT BETWEEN FEDERAL AND STATE COURTS

A. Question Stated.

The question of procedure upon which petitioner asserts a conflict between the Federal and State Courts was admirably stated and determined in the opinion of the Circuit Court of Appeals as follows:

> "It is contended by defendant in error that the effect of appealing from an interlocutory order by the plaintiff in error (defendant in the Corbett case) was a general appearance on its part in that case, and conferred jurisdiction over its person on the circuit court on the remand of the case. The rule in Florida, differing from that which obtains in the federal courts, is to the effect that an appellant, though objecting to the sufficiency of service successfully, is considered in court upon the return of the case to the lower court. Conceding that this court will follow the rule of decision in the state court, in passing upon a judgment in that court, we think the Florida rule did not apply in the Corbett case. The question of its applicability was suggested, but not decided by the Supreme Court of Florida in its opinion in that case, because the appellee asked that the appeal be decided on another ground. The Supreme Court held that—
>
> 'If the statute be followed, there is no right in the non-resident to quash this notice (by publication); he has his right, if not waived, to object should the court

thereafter commit an error against him.'

"The order of the circuit court was for that reason affirmed, apparently leaving the sufficiency and effect of the substituted service to be determined by the character of relief awarded against the non-residents upon final decree. The appeal was from an interlocutory order of the circuit court, which affected only the question of service. *It was not an appeal from a final decree, upon which the insufficiency of service was assigned, with other error, as in the cases cited supporting the Florida rule.* (Italics ours). The Florida statute allowing appeals from interlocutory orders was held by its Supreme Court in the Corbett Case to cover an order affecting service only. No other question than the rightful presence of the non-residents in the circuit court by virtue of the substituted service was presented by the appeal.

"If the rule contended for applies to such an interlocutory appeal, then the Florida Legislature and its Supreme Court did a futile thing in providing a method of appealing from an order of the circuit court sustaining service, where the taking of the appeal itself by the party complaining of service alone puts the party in court as effectually as if properly served, and renders the appeal ineffectual for any purpose. *We are not prepared* TO EXTEND THE RULE IN FLORIDA *as to the effect as an appearance of the taking of an appeal from a final decree, upon which error based on the insufficiency of service was relied upon with others, to an appeal from an* INTERLOCUTORY ORDER, WHICH INVOLVED ONLY THE QUESTION AS TO WHETHER THE APPELLANT WAS RIGHTFULLY IN COURT, *as in the Corbett case.* (Italics ours).

"Conceding that there is no authority in

> the practice of Florida for special appeals, an appeal from an interlocutory order, questioning the sufficiency of service only, is authorized, and from this it is to be implied that an appellant is to derive some benefit from the appeal, which he could not do if the taking of the appeal constituted a general appearance on his part. It is not reasonably supposable that it was intended that the taking, as allowed by the statute, of an appeal from such an order as the one in question, should have the effect of depriving the appellant of the sole benefit sought to be obtained, or obtainable, by a resort to the remedy given. *In the absence of authority from the Florida Supreme Court, applying the general rule to the case of* SUCH AN INTERLOCUTORY APPEAL, *common sense requires us to decline to make the application.* (Italics ours). This contention is made by defendant in error, though there was a stipulation in the state court case, that the supersedeas should not constitute a general appearance."

It would be difficult indeed to state in clearer or plainer language than is done by the sentences italicized in the foregoing quotation, the reasons why there is no conflict between the Federal and State Courts.

B. UNDERLYING PRINCIPLES.

There can be no question of respondent's right to have entered the special appearance in the State Court and that such special appearance did not constitute a general appearance:

Standley v. Arnow, 13 Fla. 361;
Tidwell v. Witherspoon, 18 Fla. 282;

Seacoast Lumber Co. v. R. J. and B. F. Camp Lumber Co., 63 Fla. 604;
Harkness v. Hyde 98 U. S. 476, 25 L. Ed. 237;
Davis v. Cleaveland, C. C. & St. L. R. Co., 217 U. S. 157, 54 L. Ed. 708.

Let us next examine what character of participation appears by respondent in these chancery cases after respondent's motions to quash service had been denied. Going a trifle outside the record in this particular case, and inspecting the records in the four companion cases now before this Court, it will be found that there were sixteen of these Chancery cases and that in fourteen of the cases stipulations were entered into, all of which substantially provided:

> "That proceedings in this cause be stayed pending the prosecution of an appeal from the orders of the court overruling the motions of the said defendants to quash service in the case of J. H. Corbett vs. Rome Insurance Company, et al., which said case is now on trial and being prosecuted in this Court;
>
> "That the ultimate decision of the said appeal in said case of J. H. Corbett vs. Rome Insurance Company shall be decisive of the validity of the service by publication on said defendants in this case, and if the service in the said Corbett case be ultimately held defective, and ordered quashed, then the service in this case, the validity of which involves identically the same legal questions as that in the Corbett case, shall be held defective and shall be quashed; and
>
> "That *this stipulation of Counsel shall not be considered as constituting a general appearance of the said defendants in this cause;*"

Respondent was one of the defendants referred to in this stipulation.

For some reason petitioner now completely ignores the portion of this stipulation above italicized. This portion of the stipulation is especially noteworthy in view of the second stipulation entered into by petitioner's then counsel, together with a pointed statement in the opinion of the Supreme Court of Florida.

In the remaining two of these sixteen Chancery suits, "special appeals" were taken to the Supreme Court of Florida from the interlocutory orders of the Chancellor denying the motions to quash service. These cases are known as *Rome Insurance Co. et al vs. Corbett*, 66 Fla. 438, and *Rome Insurance Co. et al. vs. Carter*, 66 Fla. 441.

In these appealed cases, were filed the stipulation with reference to respondent's application for supersedeas not constituting a general appearance. (Page 4 of this brief).

This second stipulation, petitioner in its extremity, now also completely ignores. Here again is forcibly exhibited the fact that petitioner's present counsel are strangers to the State Court cases. These counsel did not live with those cases, and, whatever the cause may be, do not display an understanding of them. The counsel who represented petitioner in the State Courts did not attempt to violate any of these stipulations before the Florida Supreme Court. Note the following from that Court:

> "It may well be that this appeal so operates as a general appearance in the circuit court, as to render the question before us a moot one, *but the appellee does not ask us so to*

hold;" (Italics ours) *Rome Ins. Co. v. Corbett*, 66 Fla. 438, 439.

Section 1908, *General Statutes of Florida*, allows an appeal from interlocutory decrees in chancery. This statute reads:

> "From interlocutory decrees. Appeals may be taken and prosecuted from any interlocutory order, decision, judgment or decree of the circuit courts of this state, when sitting as courts of equity; but the conferring of the right shall not be construed so as to deprive either party from deferring and postponing the entry of his appeal until after the entry of the final decree, or end of the cause as prescribed by law; nor shall such postponement of the appeal be decreed, held or taken to be an acquiescence in the propriety of any interlocutory order or decree made in the progress of the cause, or any waiver of any error therein."

Section 1906, *General Statutes of Florida*, provides:

> "Appeals in chancery shall be matters of right."

A ruling that the defendant is properly in court is such an order as may be appealed from. *Agnew v. Adams*, 24 S. C. 86.

Therefore when respondent exercised its "right" to appeal from the interlocutory orders of the Circuit Court over-ruling its motion to quash service, and when every pleading or paper which respondent filed in prosecuting said special appeal was emphatically limited to a special ap-

pearance, we submit that it entered a true special appeal analogous to a special appearance in a lower court, and that such an appeal does not constitute a general appearance. To hold that such an appeal did constitute a general appearance would be to deprive respondent of the "*right*" to appeal expressly given it by Statute.

In the declaration of rights of the *Constitution of Florida*, Section 4 provides:

> "SECTION 4: All courts in this state shall be open, so that every person for any injury done him in his lands, goods, person or reputation shall have remedy, by due course of law, and right and justice shall be administered without sale, denial or delay."

To hold the prosecution of the special appeal to constitute a general appearance would be to place a penalty on the exercise of the *right* to appeal. Such a holding would be a denial of justice.

A judgment of a court upon its own powers ought never to be final, or else a court would be empowered, however limited its jurisdiction, to take upon itself unbounded jurisdiction.

Respondent is entitled to have the law laid down correctly. If the Hamilton County court proceeded erroneously under the service attempted to be had upon respondent in the chancery cases, respondent has the right to be protected from such erroneous orders. The *right* is given by statute, though this statute would, from the standpoint of justice, appear to be merely declaratory of the common law, using common law in its broad sense. For *is not the object of law the protection rather than the over-throw of legal rights?*

The crucial test is this: How could a court of justice come to the conclusion that the orders of the Florida Circuit Court specially appealed from were erroneous, and then declare that the presenting of these erroneous orders to the Supreme Court of Florida for the purpose of having them corrected, completely nullified the effect of the correction? How could a judicial tribunal announce the law to be that these special appellants had been subjected to erroneous orders of the Florida Circuit Court, and in the same breath say that their ascertaining this fact deprived them of any benefit therefrom? If insufficient service had been made upon the special appellants, why should they be punished for attempting to demonstrate that fact? *Why should the special appellants be penalized for insisting on their rights?* We insist that the only answer to these questions which will be in harmony with the declaration in Section IV of the Bill of Rights of the Florida Constitution, that justice shall not be denied, is to hold these chancery appeals to be true special appeals, and that their prosecution did not constitute a general appearance. *To enforce a right should not be to lose it.* This would be contrary to natural justice.

True it is that special appellants filed several papers in the Supreme Court of Florida, as well as in the Circuit Court of Hamilton County. But they did nothing which was unnecessary in order to protect their rights and to enable them to go before the Florida Supreme Court to present the orders of the Circuit Court specially appealed from. Special appellants were not responsible for the fact that so many papers must be filed in order to prosecute an appeal. Because special appellants

have complied with the requirements of the law for prosecuting an appeal could be no ground for declaring that they have entered a general appearance.

The fact that special appellants had notice of these chancery suits cannot of itself affect in any way the question of what constitutes a general appearance. A defendant in making a motion to quash service in the Circuit Court has just as much notice of the suit as had special appellants of these suits in which they prosecuted special appeals. The mere fact that special appellants had notice of the suit and moved to quash service did not bring them into court, provided the pleadings have been limited to a special appearance.

The question is not, did respondent have notice of the chancery suits, but is, had it been legally served with process? If every sheriff in the state of Florida had gone to Georgia and delivered a copy of a subpoena to appear in this suit personally to each officer and director of respondent bank and read the subpoena to each of these officers, this would not constitute legal service. It would, however, be notice.

Furthermore, we can no more construe the purpose and effect of a pleading or other paper filed in a suit by looking only to a portion of it, than we can interpret any other written instrument by picking out only selected portions. Pleadings, like contracts, deeds, wills, statutes, court orders, and judicial opinions, are to be construed by looking at the four corners of the document. It may be, perchance, and not infrequently is, determined that a pleading when so examined is held to be a nullity. But no court can add to or detract from

a pleading any more than it can add to or detract from the terms of any other written instrument.

When we look at every pleading, paper, or even bond filed by special appellants in the Supreme Court of Florida, it becomes apparent that these pleadings and other papers were and could only be one of two things:

(1st) They were either so limited that they could not do other than amount to a special appeal —their definite limitations would absolutely stand in the way of their amounting to a general appearance, or

(2nd) The limitations conspicuously written into these papers were so drastic that the papers were a nullity.

When the Florida Supreme Court accepted the transcripts of record, and rendered its decision based thereon, it decided that the pleadings, etc., were not nullities; but neither the Florida Supreme Court nor any other Court could re-write these pleadings or make them other than what the parties had made them. Therefore the Florida Supreme Court must be held to have accepted these transcripts as filed in and amounting to a special appeal. The Florida Supreme Court certainly did not hold otherwise, for they expressly stated that:

> "These non-residents have sued out *what they term a special appeal.* (Italics ours).
>
> "It may well be that this appeal so operates as a general appearance in the Circuit Court, as to render the question before us a moot one, but the appellee does not ask us to so hold, and it appears that this is but a test case, upon the decision of which many other cases in that court are depending." *Rome Insurance Co. vs. Corbett*, 66 Fla. 438, 439.

Moreover, the then counsel on the other side were convinced of the soundness of our position.

Special appeals of this character are not new, and so far as we have been able to find authorities upon this point, they are uniform in holding that such an appeal does not constitute a general appearance.

Columbia Screw Co. v. Warner Lock Co., 138 Cal. 445, 71 Pac. 498;
Freer v. White, 91 Mich. 74, 51 N. W. 807;
Craighead v. Martin, 25 Minn. 41;
Hurlburt v. Palmer, 39 Neb. 158, 57 N. W. 1019;
Lyons v. Miller, 2 N. D. 1, 48 N. W. 514;
Paxton v. Daniel, 1 Wash. St. 19, 23 Pac. 441;
Dikeman v. Mrotek, 76 Wis. 332, 45 N. W. 118.

"*Non potest adduci Exceptio ejusdem Rei cujus petitur Dissolutio.*" (A matter, the validity of which is at issue in legal proceedings cannot be set up as a bar thereto). *Broom's Legal Maxims*, 8 ed. 133.

C. First Distinction Between State and Federal Rulings—No Voluntary Appeal.

Petitioner refers to the holding of the Florida cases to the effect that:

> "As the appellant has made herself a party to the suit by *voluntarily* (italics ours) appearing and prosecuting her appeal, she must, upon the return of the cause to the Circuit Court, be considered as regularly before the

> court in like manner as if she had been duly served with process," *Standley v. Arnow*, 13 Fla. 361.

We call attention to just what was announced in *Standley vs. Arnow, supra.* The Court states that since appellant made herself a party to the suit by voluntarily appearing, etc., she must be considered as regularly before the court. *The word* VOLUNTARILY *marks one of the distinguishing features between all holdings of the Florida Court, and the present case.* Special appellants showed as far as it was possible to be shown, that they had not voluntarily appeared, either in the lower or the appellate court. They no more voluntarily appeared to prosecute their special appeal than they did when they entered their special appearance in the lower court and moved to quash service. The one cannot constitute a voluntary or general appearance more than the other.

To show how the subsequent Florida cases dealing with the question of an appeal constituting a general appearance are founded on *Standley vs. Arnow*, we quote from these later cases:

In *Tunno & Jessup & Co. v. Robert*, 16 Fla. 738, on page 751 the Court says:

> "The persons composing the firm of M. K. Jessup & Co., having appeared upon this appeal in this court, upon the return of the cause to the Circuit Court must be considered as regularly before this Court in like manner as if duly served with process. 13 Fla. 368; 1 Pike 50, 376, 386, 405; 4 Bibb 84, 167."

In this case the reference to 13 Fla. 368 is to the quotation taken above from *Standley vs. Arnow.*

In *Shrader v. Shrader*, 36 Fla. 502, on page 518 the Court says:

> "Mrs. Shrader, the appellant in Case No. 2 having by her appeal made herself a party to such case, should proceed to plead to the bill of complaint therein. *Standley v. Arnow*, 13 Fla. 361."

In *Wylly v. Sanford Loan & Trust Co.*, 44 Fla. 818, 820, the Court says:

> "The appeal of the defendants operated as an appearance in the cause however, which will enable the Court below now to proceed in the matter. *Standley vs. Arnow*, and *Finlayson v. Lipscomb, supra.*"

The reference to *Finlayson v. Lipscomb* in the last quotation is meant to be to the case of *Tunno & Jessup & Co. v. Robert.* This is shown by looking up the citation given for *Finlayson v. Lipscomb* earlier in the opinion in *Wylly v. Sanford Loan & Trust Co.*

In *Rumeli v. City of Tampa*, 48 Fla. 112, on page 114 the Court says:

> "The appeal of the defendant Rumeli operated as an appearance in the cause, however, which will enable the Court below to proceed in the matter. *Wylly v. Sanford Loan & Trust Co.*, 44 Fla. 818."

This case as seen follows point-blank *Wylly v. Sanford Loan & Trust Co.*, which in turn follows *Standley v. Arnow* and *Tunno & Jessup & Co. v. Robert. Tunno & Jessup & Co. v. Robert* has been seen to refer directly back to *Standley v. Arnow.*

Thus we see that *Standley v. Arnow, supra,* is the case which each subsequent Florida case either cites directly as the authority for its holding, or is the case to which each of these subsequent cases leads back as its basis.

Petitioner contends that the special appearance was a "voluntary" proceeding, though presenting not a single authority in support thereof.

The authorities seem to be unanimous that *such a proceeding is not voluntary.*

In *Craighead v. Martin,* 25 Minn., 41, it is said:

> "It would seem too plain for argument that such an act, which in itself is a denial of all authority in the justice, cannot be regarded as a voluntary appearance, and express recognition of his authority."

In *Freer v. White,* 91 Mich. 74, 51 N. W. 807, the Michigan Court pertinently said:

> "It would be presuming against the fact to assume that there was any intention on the part of the defendant to submit himself to the jurisdiction of the court."

In *Pugh v. Loisel,* 219 Fed. 417, 424, (5th. C. C. A.) is the following:

> "He is not to be held to have voluntarily submitted himself to the jurisdiction of that court by protesting against its exercise of jurisdiction. *Big Vein Coal Co. v. Read,* 229 U. S. 31, 33 Sup. Ct. 694, 57 L. Ed. 1053."

This last court again in *Smith v. Government of Canal Zone,* 249 Fed. 273, 278, said:

"This appellant's admission of the court's jurisdiction, or consent to the exercise of it, is not to be inferred or implied from a previous explicit denial of its jurisdiction, though such denial was based upon grounds other than the one stated in the motion to set aside the service of process. *A denial of jurisdiction is not to be given effect as an admission of it.* (Italics ours). *Big Vein Coal Co. v. Read*, 229 U. S. 31, 33 Sup. Ct. 694, 57 L. Ed. 1053; *Pugh v. Loisel*, 219 Fed. 417, 135, C. C. A. 221."

In *Harkness v. Hyde*, 98 U. S. 476, 478, 25 L. Ed. 237, this court said:

"Illegality in a proceeding by which jurisdiction is to be obtained is in no case waived by the appearance of the defendant for the purpose of calling the attention of the court to such irregularity."

This Court further said *In the matter of Indiana Transportation Co.*, 244 U. S. 456, 458, 61 L. Ed. 1253, 155:

"Persons by becoming suitors do not place themselves for all purposes under the control of the Court."

D. Second Distinction Between State and Federal Rulings—No Adjudication or Contest on Merits.

Special appellants in no way contested the chancery suits on the merits. They appeared specially and for one purpose only. This purpose was to settle the question of service. No other

question had been raised by any of the defendants. There had been no adjudication whatever on the merits.

Jurisdiction is founded upon service, or, as the Federal Supreme Court says, upon "physical power," which is obtained only by due serivce of process. The first question to be settled in any case is that of jurisdiction. Courts will settle questions of jurisdiction, whenever possible, preliminarily to entering upon the cause. This is precisely and solely what the present respondent requested of the court in the chancery cases. After the chancery court assumed to go into the merits of those cases, the present respondent refrained from the slightest participation.

In each of the cases cited by petitioner in which the Florida Supreme Court held an appeal to constitute a general appearance, the appeal was upon an adjudication of the merits of the case, and not merely upon a ruling on the question of service—with the single exception of the case of *Rome Insurance Co. v. Corbett* which is the decision we are here analyzing and which we are emphatic in asserting does not hold what petitioner contends (pages 34 and 35 of this brief).

In Mr. Fleming's brief, page 9, it is stated:

> "In the case of *Rumeli v. Tampa*, 48 Fla. 112, 37 So. 563, it appeared that the appeal was from an interlocutory appeal, the only decree mentioned in the opinion of the Court or the statement of facts being a decree *pro confesso*."

In reply we quote from a letter written by the Clerk of the Florida Supreme Court:

"The record in the case of *Rumeli v. City of Tampa*, 48 Fla. 112, shows that Judge Wall entered a final decree in said cause November 7, 1903, a decree *pro confesso* having been entered therein November 2, 1903. The final decree purported to run against Rumeli as well as against the other defendants named in the bill."

It thus appears that, without a single exception, in every case in which the Florida Court held an appeal to constitute a general appearance, the appeal was taken after entry of final decree.

A second distinction between this Corbett case and all other Florida cases is the lack, in the Corbett appeal, of any adjudication or contest whatsoever on the merits.

Furthermore five of the cases cited by counsel are decisions on writs of error at common law, and are not in point.

These cases are:

Drew Lumber Co. v. Walter, 45 Fla. 252;
Hayman v. Neil, 53 Fla. 127;
Barnick v. Rouse, 53 Fla. 643;
Busard v. Hutson, 65 Fla. 479;
Henry v. Spitler, 67 Fla. 146.

Unlike Florida chancery practice allowing appeals from interlocutory orders (page 22 of this brief), common law writs of error are allowed in Florida only after final judgment.

Section 1691 of the General Statutes of Florida reads:

"*Writs of error—only from final judgments:* Writs of error shall lie only from

final judgments except as specified in Section 1695."

Section 1695 of the Florida General Statutes, referred to in the section just quoted, allows writ of error to the party aggrieved by the granting of a motion for new trial, without waiting for final judgment. Even so a writ of error follows a contest on the merits.

That an appeal solely upon questions of service or jurisdiction over a defendant is not a general appearance, see cases collated on page 27 of this brief.

E. Real Holding of Florida Court.

The Florida Supreme Court did not hold the so called constructive service to be a valid service, nor the special appeal to be a general appearance. What it did hold was that this so called service was a mere notice, which may be paid attention to or not, as the defendant may choose. Said the Florida Court:

> "The purpose of the statute authorizing constructive service by publication is to notify non-residents of the pending suit so that they may if they care to do so, come into the case, and if the statute be followed, there is no right in the non-resident to quash this *notice;* he has his right if not waived, to object should the court thereafter commit an error against him," (italics ours) *Rome Ins. Co., et al. vs. Corbett,* 66 Fla. 438, 440.

Therefore, the most that can be said is that the respondent received a notice that sixteen chan-

cery suits had been brought against him, which notice was lawfully given. This notice did not give the chancellor "physical power" *in personam* over respondent.

The giving of this notice is not "confined in its operation to the cases where the court might make final decree or judgment . . . . It was not intended that the question of the power to enter the ultimate decree or judgment should enter into the question of the right to give notice of the suit to a non-resident . . . . . We are not to assume upon the face of the bill that the Circuit Court will enter an unauthorized decree." Quoted from *Rome Ins. Co. vs. Corbett*, 66 Fla. 438.

But the Circuit Court of Hamilton County did proceed to enter an unauthorized decree—a decree beyond its power to enter—a decree falling within that class of cases in which a mere notice of suit to a non-resident does not permit of the making of a final decree or judgment. Such a decree is just as much a nullity, as was the judgment held void in *Pennoyer v. Neff*, 96 U. S. 714, 24 L. Ed. 565.

III.

THIS CASE DOES NOT WARRANT GRANTING A WRIT OF CERTIORARI

A. No Conflict Between Federal and State Courts.

It is submitted that we have just shown the non-existence of the asserted conflict "between the Supreme Court of the State of Florida and the

United States Circuit Court of Appeals in and for the Fifth Circuit" (first ground of petition), which is the principal and really the sole ground upon which petitioner relies in seeking a writ of certiorari.

B. FEDERAL COURT ENTITLED TO EXERCISE ITS OWN INDEPENDENT JUDGMENT.

Had there existed such conflict as petitioner contends, the Federal Court should exercise its own independent judgment upon the validity and effect of service of process attempted by the Florida State Court upon this respondent foreign corporation bank. The courts of the United States will not leave a foreign corporation to the mercy of the decisions of state courts respecting the validity and effect of a purported service, either actual or constructive:

Goldey v. Morning News, 156 U. S. 518, 39 L. Ed. 517;
Barrow Steamship Co. v. Kane, 170 U. S. 100, 111, 42 L. Ed. 964, 968;
Conley v. Mathieson Alkali Works, 190 U. S. 406, 47 L. Ed. 113;
Mechanical Appliance Co. v. Castleman, 215 U. S. 437; 54 L. Ed. 272;
Riverside & D. R. Cotton Mills v. Menefee, 237 U. S. 189, 59 L. Ed. 910;
Meisukas v. Greenough Red Ash Coal Co., 244 U. S. 54, 61 L. Ed. 987.

We would also refer to the recent pertinent statement of Mr. Justice McKenna in *Chipman v. Thomas B. Jeffrey Company*, decided January 19, 1920:

"In resting the case on New York decisions we do not wish to be understood that the validity of such service as here involved would not be of Federal cognizance, whatever the decision of a state court, and refer to *Pennoyer v. Neff*, 95 U. S. 714, 24 L. Ed. 565; *St. Louis Southwestern R. Co. v. Alexander, supra; Philadelphia & R. R. Co. v. McKibbin*, 243 U. S. 264, 61 L. Ed. 710, 37 Sup. Ct. Rep. 280; *Meisukas v. Greenough Red Ash Coal Co.* 244 U. S. 54, 61 L. Ed. 987, 37 Sup. Ct. Rep. 593; *People's Tobacco Co. v. American Tobacco Co.* 246 U. S. 79, 62 L. Ed. 587, 38 Sup. Ct. Rep. 223, Ann. Cas. 1918 C, 537."

Furthermore, the rights of holders of commercial paper are here involved, and in such cases the courts of the United States exercise their own independent judgment:

Pana v. Bowler, 107 U. S. 529; 27 L. Ed. 424;

Presidio County v. Noel-Young Bond & Stock Co., 212 U. S. 58, 73; 53 L. Ed. 402, 408;

Rollings v. Lake County, 34 Fed. 845, per Brewer, J;

Bank of Edgefield v. Farmers Cooperative Mfg. Co., 52 Fed. 98, (5th. C. C. A.)

Town of Newberne v. National Bank of Barnesville, Ohio, 234 Fed. 209, (6th. C. C. A.)

The property right of the holder of a negotiable instrument is different from the right of the owner of real property or other personal chattels, as pointed out in *Town of Enfield v. Jordan*, 119 U. S. 680, 693, 30 L. Ed. 523, 529:

> "Rights to real property and personal chattels within the jurisdiction of the court, and subject to its power, may be affected by *lis pendens*, but not those acquired by the transfer of negotiable securities or by the sale of articles in market overt in the usual course of trade."

Said Mr. Justice Story in *Swift v. Tyson*, 16 Peters 1, 19, 10 L. Ed. 865, 871:

> "The law respecting negotiable instruments may be truly declared in the language of Cicero, adopted by Lord Mansfield in *Luke v. Lyde*, 2 Burr. R. 883, 887, to be in a great measure, not the law of a single country only, but of the commercial world. *Non erit alia lex Romae, alia Athenis, alia nunc, alia posthac, sed et apud omnes gentes, et omni tempore, una eademque lex obtinebit.*"

The state court cases are a patent attempt to keep from this respondent foreign corporation bank its right to submit to a court of the United States the merits of its claim on the certificates of deposit. Well may we recall what this Court said in *Gordon v. Longest*, 41 U. S. 97, 104, 10 L. Ed. 900, 903:

> "One great object in the establishment of the courts of the United States and regulating their jurisdiction was to have a tribunal in each state, presumed to be free from local influence, and to which all who were non-residents or aliens might resort for legal redress.'

C. THIS PURELY PRIVATE CONTROVERSY WOULD NOT JUSTIFY A WRIT OF CERTIORARI BEFORE FINAL JUDGMENT.

Said this Court in *Forsyth v. Hammond*, 166 U. S. 506, 514, 41 L. Ed. 1095, 1098:

> "We have declined to issue writs of certiorari in cases where, there being only a matter of private interest, there had been no final judgment in the court of appeals. *Chicago & N. W. R. Co. v. Osborne*, 146 U. S. 354."

Neither the interest of the nation nor of any state is here involved. The decision of the United States Circuit Court of Appeals is by a unanimous court. Petitioner did not apply for a rehearing in the Court of Appeals. The asserted conflict between the state and federal courts is indicated by petitioner only in the vaguest and most shadowy manner, and, as herein shown, is without merit.

It is submitted that the petition for writ of certiorari should be denied.

Respectfully submitted, /Henry C. Clark.

HENRY C. CLARK,
Attorney and Counsel for Respondent.

W. E. KAY, W. E. Kay,
J. L. DOGGETT, J. L. Doggett.
Of Counsel.

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FILE NO. 27,729

IN THE

Supreme Court of the United States

October Term, 1921

No. 76

THE BANK OF JASPER,
A CORPORATION,

Petitioner,

vs.

THE FIRST NATIONAL BANK OF ROME,
A CORPORATION,

Respondent.

BRIEF FOR RESPONDENT

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IN THE

Supreme Court of the United States

THE BANK OF JASPER,
A CORPORATION
Petitioner

VERSUS

FIRST NATIONAL BANK OF ROME, GEORGIA,
A CORPORATION
Respondent

October Term, 1921

No. 76

BRIEF FOR RESPONDENT

STATEMENT

In this action, instituted January 27th, 1913, (R. 2), respondent bank, a foreign corporation citizen of Georgia, seeks to recover from petitioner bank, a citizen of Florida, upon the several certificates of deposit described in and attached to the several counts of respondent's declaration (R. 6.) The obligation represented by these certificates of deposit had matured in November 1912, two months preceding the institution of this suit.

There is but one plea to each count at present standing in the record (R. 104). This plea sets up a

purported decree of the State Circuit Court of Hamilton County, Florida, in Chancery, which decree attempts to cut off respondent's rights in and to the certificates of deposit sued on in the respective counts (R. 9). Respondent demurred to this plea contending that it was bad because the decree therein set forth was based on mere constructive service of process and yet the decree sought to operate *in personam*, (R. 42.) The District Court over-ruled this demurrer. (R. 44.) In so doing the District Court rendered an opinion in the case of *First National Bank of Jasper, Florida vs. The First National Bank of Rome, Georgia*, (No. 74) which is found at page 30 *et seq.* of the transcript of record in that case.

Respondent filed one replication to the petitioner's plea to each count (R. 45). This replication sets forth in detail every step of said chancery suit in the Florida State Courts in so far as respondent in any way participated therein, and shows the total invalidity of said decree attempting to cut off respondent's rights. Petitioner demurred to this replication which demurrer was sustained (R. 104.) The District Court in sustaining this demurrer announced that "the questions attempted to be raised by these replications are questions passed upon by this Court in its ruling upon the demurrer to the pleas. I adhere to the ruling then made." (R. 104.)

There was and could have been no showing in said chancery suit that respondent foreign corporation bank was doing business in Florida, or had any representative in Florida upon whom service was or could have been made. The only semblance or service of process was by publication.

The State Court Chancery Suit was insti-

tuted January 3rd, 1913, (R. 55), after the obligation represented by the certificates of deposit had matured, and only a short while before the present suit was begun. The State Court cases are a patent attempt to keep from this respondent foreign corporation bank its right to submit to a court of the United States the merits of its claim on the certificates of deposit. Well may we recall what this Court said in *Gordon v. Longest*, 41 U. S. 97, 104, 10 L. Ed. 900, 903:

> "One great object in the establishment of the courts of the United States and regulating their jurisdiction was to have a tribunal in each state, presumed to be free from local influence, and to which all who were non-residents or aliens might resort for legal redress."

Looking at the proceeding in said chancery suit as set forth in said plea and replication, it is seen that both the original and amended Bills of Complaint therein, by their very allegations, preclude any contention that said equity suit was *in rem*, for in both of said Bills it was distinctly alleged that the said certificate of deposit was void, and the Bills prayed for a decree declaring the certificate of deposit to be void, (R. 59, 68); that every pleading or other paper of any kind filed by the respondent in said chancery suit was limited and recites that the respondent was "not appearing generally but appearing specially, solely and only and limiting this appearance to what in contemplation of law amounts only and solely to a special appearance;" that respondent filed two motions to quash the attempted service upon it, the second motion being filed after an amendment to the

bill of complaint; that each of these motions was denied; that, thereupon, "special appeals" were sued out in two chancery cases, and stipulations filed in fourteen other chancery cases that the decision of the Florida Supreme Court in the two cases should be decisive of the validity of the service in the fourteen cases, *but that the stipulations shall not be considered as constituting a general appearance;* (that there were sixteen chancery cases in all will appear by an examination of the four transcripts as filed in the Circuit Court of Appeals and now before this Court in the instant and its three companion cases;) a second stipulation was entered into in the chancery cases which further emphasizes that these special appeals did not constitute a general appearance, this second stipulation being appended to the notice of application for supersedeas and reading "*We agree that this notice shall in no sense operate as a general appearance in the above case*" and is signed by the then counsel for complainant (R. 74); that after the ruling of the Supreme Court of Florida, no further participation was taken by respondent in said chancery cases; that nevertheless the Florida Circuit Court proceeded to enter a final chancery decree purporting to take away valuable rights of the respondent.

It should also be noted that the pleas setting up the State Court decrees are entitled "Addtional pleas" : that these "additional pleas" were not interposed until August, 1914 (R. 9), more than a year and a half after this suit had been instituted; and that the State Court decrees were not entered until July, 1914 (R. 18 et seq)., approximately eighteen months after the institution of this suit.

The United States Circuit Court of Appeals held: (1st) there was no *res to* confer jurisdiction upon the state court; (2nd) no general appearance was made by respondent in the state court; and (3rd) the state court decree not being a personal decree could not be a defense to this suit. (R. 43.) The United States Circuit Court of Appeals reversed the District Court (R. 124.)

Petitioner asserts a conflict between this decision and the decision of the Florida Supreme Court in *Rome Insurance Company, et al. v. J. H. Corbett*, 66 Fla. 438.

Respondent (1) denies that such conflict exists and (2) contends that even if the asserted conflict were a fact, it would be of such nature that the Federal Court would exercise its own independent judgment.

We shall (1st) determine the nature of the State Court suits, (2nd) analyze the asserted conflict between the Federal and State Court, and (3rd) ascertain the power of the Federal Court to adjudicate the questions presented.

ARGUMENT

I.

THE STATE COURT SUITS WERE NOT IN REM.

A. No Res Existed, Under Allegations of Bill.

If anything stands out conspiciously in the state Court cases it is the denial of any indebtedness owing to respondent. This denial appears in the original bill, the amended bill, and in the decree of the State Court. Yet notwithstanding these denials this same indebtedness is now claimed to have constituted a *res* in the State Court.

The theory of the chancery suits cannot now be changed; the indebtedness then denied cannot now be affirmed; the *res* which did not then exist cannot now be created. Petitioner is estopped from asserting anything but that the *res* was non-existent.

Petitioner's counsel refer to many cases of attachment and of garnishment. In such cases, the indebtedness attached or garnished is not denied by the application for the attachment or garnishment. If the indebtedness sought to be attached or garnished should be denied in the very affidavit in which it is applied for, can it be supposed for a moment that a writ would issue, or if issued, would stand?

There must be a "real, not an imaginary" *res* to furnish the base for a proceeding *in rem*.

> *Chase v. Wetzlar*, 225 U. S. 79, 89, 56. L. Ed. 990, 995.

The counsel now representing petitioner were not counsel in the State Court cases, nor during the earlier stages of the present suit. When these counsel came into this case, respondent had long been vigorously and affirmatively asserting the validity of its certificates of deposit, and its right to collect thereon. As a consequence, the present counsel for petitioner have not been able to look at the State Court cases through the eyes of one who prepared them, fought through them and claimed from the start that respondent's certificates of deposits were void. *PEITIONER'S PRESENT COUNSEL* claim the certificates of deposit are void by virtue of the State Court decree. *THEIR CLIENTS* claimed these certificates of deposit were void from the moment the first bill was filed in the State Court. This original claim removes and destroys even the possibility of there being a *res* in the State Court.

Petitioner cannot blow hot and cold. *Allegans contraria non est audiendus.* It cannot both affirm and deny. It cannot deny an indebtedness or *res* in the State Court, and under the same facts, avow an indebtedness or *res* in the Federal Court. We have here an estoppel by record. Petitioner made his bed in the State Court and must lie on it. Changing counsel will not enable petitioner to transform a denial into an affirmance.

Gill v. More (Ala.) 76, So. 453 holds:

> "Where an action is based upon a denial of any *res* in defendant, if the decree sought be a decree operating *in personam* only, to be made under the ordinary jurisdiction of equity, as though de-

> fendant make or cancel a conveyance, it can only be made after personal service within the jurisdiction or after appearance."

In *Davis v. Wakelee* 156 U. S. 680, 39 L. Ed. 578, this Court said:

> "When a party assumes a certain position in a legal proceeding and succeeds in maintaining that position, he may not thereafter, simply because his interests have changed, assume a contrary position.

To this point see also:

Brooklyn City & Newtown Railroad Company v. National Bank of the Republic, 102 U. S. 14, 26 L. Ed. 61,

Daniels v. Tearney 102 U. S. 415, 26 L. Ed. 187,

Pease v. Rathbun-Jones Engineering Company, 243 U. S. 273, 61 L. Ed. 715,

Norfolk Southern Railway Company v. Chatman 244 U. S. 276, 61 L.Ed. 1131.

Counsel have failed to show any sort of seizure, attachment, sequestration or impounding by the State Court. There was none. The chancery bills informed the State Court, that no indebtedness existed. Absolutely no other showing was ever made to the State Court. To stretch out the hand to seize a non-existant leaves the hand empty. But the State Court did not even reach out its strong arm." Obviously not. Such would have been futile.

In *Loiza v. Superior Court of San Francisco*, 85 Cal. 11, 20 Am. St. Rep. 197, 9 L. R. A. 376, the case principally relied upon by petitioner in the State

Court and in the United States District Court as a precedent for the State Court suits, and the case referred to in the opinion of the District Court (R.30 of case No. 74), a receiver was appointed who actually took possession of certain property. No receiver was prayed for in the instant case, and for good reason. What funds could a receiver have identified and taken charge of as representing this denied indebtedness? Certainly it is not to be assumed that the petitioner bank had segregated a specific lot of funds with which to meet payment of the obligation to respondent due "in current funds." And had petitioner done this, it could not thereby affect respondent's rights under its certificates of deposit.

The real and only purpose of the State Court suits as against this respondent was to cancel and decree to be void the certificates of deposit herein sued upon (see third ground of petition for certiorari.) In the absence of any showing to the contrary, it will be presumed that these certificates of deposit were in the possession of respondent in its banking house in Georgia. Yet when this foreign corporation bank comes into the United States Court to collect upon these certificates, it is met by a State Court decree purporting to adjudicate that it holds merely a void scrap of paper.

In *Stockbridge v. Phoenix Mutual Life Insurance Co.*, 193 Fed. 558, 559-560 (Dist. Ct., D. Conn.), the court had before it a bill as novel as the bills filed in the Florida Court, and regarding this bill the Federal Court pertinently said:

> "The petitioner has presented a very clever bill————. The court ————is bound

to dissect and analyze, so that it may learn what is the real nature of the bill."

"The absent defendant has, in law, a claim against the insurance company as the beneficiary under the two policies. The policies are merely statements on paper of what the contract was. The conditions precedent in the contract have been fulfilled, and payment of the contract is due. Is the claim a tangible, fixed, definite, and certain thing, with its situs here? It strikes me that Mrs. Ringwait can assert and enforce her claim against the insurance company without coming into this district. It is a claim, which from its inherent nature, is transitory, attaches to her person, and can be taken with her wherever she goes. It is like the contents of a handbag, in which she might carry the usual accessories on a journey. She is no more constrained to come to Hartford to make the use of her claim than she would be to use the contents of the handbag. It is a thing subject to constant shifting, changing, and uncertainty. That the policies may have been within the district when the suit was brought was immaterial. She could press her claim in another forum in spite of their presence here. The papers upon which the contracts of insurance are written are not the essence of the contention which this suit presents."

The State Court suits are an anomaly. They are a patent attempt by local citizens to rush into a local State Court and attempt to destroy past due negotiable instruments held by citizens of another State. The only case even slightly in point which counsel have been able to cite in support of their right to do this is *Loiza v. Superior Court of San Francisco supra*, but in that case, the notes, mortgages and gold

coin in suit were within the jurisdiction of the California Court and taken into custody by a receiver, under direction of a Court order. Here the certificates of deposit were in Georgia and the indebtedness represented thereby asserted in the bills of complaint to be void. No Court has ever held that such a suit was *in rem*.

B. Equity Acts in Personam.

The fact that respondent claims the right to collect its certificates of deposit out of "current funds" of petitioner did not authorize a decree against respondent upon mere constructive service, assuming for the moment that "current funds" could constitute a *res*. While only the certificates of deposit issued by the First National Bank of Jasper used the language "payable in current funds," yet necessarily this is all that the certificates issued by the Bank of Jasper could call for. No special fund was created, and certainly neither bank intended to or did set aside and keep idle a specific fund as represented by these certificates of deposit.

These State Court cases were in a Court of Equity.

Equity is a Court of conscience. Its attention is directed primarily to the duty of the defendant, and it vindicates the right of the plaintiff through compelling the defendant to fulfill his co-relative duty, ordering him to do the very act he is under obligation to do, or to refrain from the very act he is under obligation not to do. Hence the maxim "Equity acts *in personam*."

While this power to act *in personam* upon the defendant in many ways enlarges the ability of

the Chancellor to effect redress for the plaintiff, it also constitutes a specific limitation in other ways upon the jurisdiction of the Chancellor.

At no time throughout this litigation, has it been contended by the other side that any statute of Florida authorizes a chancellor to proceed *in rem* as against personal property. Furthermore in Florida, the Courts have not developed by a species of judicial legislation, any sort of spurious doctrine that will authorize a Chancellor to act and adjudicate *in rem* except where such authority is given him by statute.

Therefore, with neither a Florida statute nor a Florida decision authorizing a Chancellor to act *in rem* in this case, it is not to be expected that this United States Supreme Court will undertake judicially to legislate regarding the powers of a Court of Equity in Florida.

The State Court suits are as closely analogous to a bill to remove a cloud on title as to any known form of procedure. It is settled that such a suit, in the absence of a statute, is *in personam*, and a non-resident defendant served merely constructively is not bound by a decree therein entered; *Hart v. Sansom*, 110 U. S. 151, 28 L. Ed. 101.

In that case this Court said:

> "Generally, if not universally, equity jurisdiction is exercised *in personam*, and not *in rem*, and depends upon the control of the court over the parties, by reason of their presence or residence and not upon the place where the land lies in regard to which relief is sought. Upon a bill for the removal of a cloud upon title, as upon a bill for the specific performance of an agreement

to convey, the decree, *unless otherwise expressively provided by statute*, (Italics ours,) is clearly not a judgment *in rem*, establishing a title in land, but operates *in personam* only, by restraining the defendant from asserting his claim, and directing him to deliver up his deed to be cancelled, or to execute a release to the plaintiff. *Langdell Eq. Pl.* (2nd Md.) Sec. 43, 184; *Massie vs. Watts*, 6 Cranch. 148; *Orton vs. Smith*, 18, How. 263, *Vandever vs. Freeman*, 20 Tex. 334.

It would doubtless be within the power of the State in which the land lies to provide *by statute* (Italics ours) that if the defendant is not found within the jurisdiction or refuses to make or cancel a deed, this should be done in his behalf by a Trustee appointed by the court for that purpose. *Felch vs. Hooper*, 119, Mass. 52; *Ager vs. Murray*, 105 U. S. 126, 132. But in such a case, as in the ordinary exercise of its jurisdiction a court of equity acts *in personam*, by compelling a deed to be executed or cancelled by or in behalf of the party. It has no inherent power, by the mere force of its decree, to annul a deed, or to establish a title."

Hart vs. Sansom, supra, involves constitutional rights. Respondent relies upon the rights recognized and announced in that case. These rights have never been altered or limited and to them the doctrine of *stare decisis* is applicable.

We would also refer to the valuable discussion of the nature of equity decrees found in *Langdell's Equity Pleading*, 2nd Ed., Sections 42 and 43, also note appended to Section 42, and found on pages 35 to 38, also Section 184. These citations are specifi-

cally approved in *Hart vs. Sonsam, supra.* See also the clear discussion in 10 R. C. L. 364 and 387.

In *Boswell's Lessee v. Otis, et. al.,* 9 How. 336, on page 350, 13 L. Ed. 164, 170, this Court said:

> "No principle is more vital to the administration of justice, than that no man shall be condemned in his person or property without notice, and an opportunity to make his defence. And every departure from this fundamental rule, by a proceeding *in rem*, in which a publication of the notice is substituted for a service on the party, should be subjected to a strict legal scrutiny. *Jurisdiction cannot be assumed and exercised in such cases upon the general ground, that the subject matter of the suit is within the power of the court.*" (Italics ours.)

The leading case of *Baldin vs. Hale,* 1 Wall. 223, 234, 17 L. Ed. 531, holds, as stated in the opinion, page 534:

> "Insolvent laws of one state cannot discharge the contracts of citizens of other states, because they have no extra-territorial operation, and consequently the tribunal sitting under them, unless in cases where a citizen of such other state becomes a party to the proceeding, has no jurisdiction in the case. *Legal notice cannot be given* and, consequently, there can be no obligation to appear, and of course there can be no legal defaults." (Italics ours.)

An action for specific performance cannot, in the absence of a statute, be maintained by the courts of the State in which the property is located, against a non-resident served only constructively.

Hollingsworth v. Barbaur, 4 Peters 466; 7 L. Ed. 922;

Texas Company v. Central Fuel Oil Co., 194 Fed. 1 (CCA 8th Cir.)

Snell v. Hill, 263 Ill. 211, 105 N. E. 16;

Homer v. Ellis, 75 Kan. 675; 90 Pac. 275; 121 Am. St. Rep. 446;

Spurr v. Scovill, 3 Cush. 578;

Silver Camp Mining Co. vs. Dickert, 31 Montana 488; 78 Pac. 967; 67 L. R. A. 940; 3 Ann Cas. 1000.

An injunction operates only *in personam*, *Hitchman Coal & Coke Co. v. Mitchell*, 245 U. S. 229; 62 L. Ed. 160.

The nature of an interpleader suit is particularly noteworthy in determining the validity of the decrees of the Florida State Court. In an interpleader suit, the complainant places an actual specific fund in the very lap of the Court, and prays its adjudication as between the interpleaded defendants. Here might seem to be a *res*. But it is uniformly recognized that a non-resident defendant served only by publication is not bound by a decree which undertakes to cut off his rights:

New York Life Ins. Co. v. Dunlevy, 241 U. S. 518, 521; 60 L. Ed. 1140, 1142;

Bell v. Gunn, 94 Ga. 642; 21 S. E. 899;

Gary v. Northeastern Masonic Aid Assn. (Iowa), 50 N. W. 27;

Tremblay v. Aetna Life Ins. Co., 97 Me. 547; 55 Atl. 509; 94 Amer. St. Rep. 521;

Expressmen's Mutual Benefit Assn. v. Hurlock, 91 Md. 585; 46 Atl. 957; 80 Amer. St. Rep. 470;

Scharmann v. Union Pac. Ry. (Minn.) 175 N. W. 554;

Ward v. Bankers Life Co. 99 Neb. 812; 157 N. W. 1017;

Cross v. Armstrong, 44 Ohio State 613; 10 N. E. 160;

Washington Life Ins. Co. v. Gooding, 19 Tex. Civ. App. 490; 49 S. W. 123.

Cross v. Armstrong, supra, is an especially strong and well-reasoned case and because of its importance we quote therefore somewhat at length:

> "It is urged when the company asked that an interpleader be awarded, and brought the money owing by it into court, the court then obtained jurisdiction of the fund, and, from that time forward, the proceeding was one essentially *in rem*, and the court, having then obtained jurisdiction of the *res*, and having given notice according to the laws of Pennsylvania, had ample power to hear and determine, and having so heard and determined, the parties are bound by the judgment. That such proceeding could be *in rem* seems a novel doctrine. *'In Rem'* is understood to be a technical term, taken from the Roman law, and there used to distinguish an action against the thing from one against the person, the terms *in rem* and in *personam* always being opposite one of the other; an act *in personam* being one done or directed against a specific person, while an act *in rem* was one done with reference to no specific person but against or with reference to, a specific thing, and so against whom it might concern, or 'all the world.' A proceeding brought to determine the *status* of the thing itself,—the *particular thing*,—and which is confined to the subject matter *in specie*, is *in rem*, the judgment being

intended to determine the state or condition, and, *pro facto*, to render the thing what the judgment declares it to be, while a proceeding which seeks the recovery of a personal judgment is *in personam*. In the former, process may be served on the thing itself, and by such service, and making proclamation, the court is authorized to decide upon it without other notice to persons, all the world being parties, while, in the latter, in order to give the court power to adjudge, there must be a service upon those whose rights are sought to be affected. As regards rights, the terms signify an antithesis of 'available against a particular person', and 'available against the world at large.' Thus, '*jura in personam*' are rights primarily available 'against specific persons; *jura in rem*, rights only available against the world at large.' Beyond this, a judgment of decree *in rem*, or in the nature of a judgment *in rem*, while it binds third persons, such as the sentence of a court of admiralty on a question of price; or a decree of other courts upon the personal *status* or relation of the party such as dissolution of marriage contract, bastardy, etc.; a decree in probate court admitting a will to probate and record, granting administrators, etc.; or a decree of a court of a foreign country as to the *status* of a person domiciled there. We quote from *Freem. Judgm.* the definition of 'judgment *in rem*' given by that author: 'An adjudication against some person or thing, or upon the *status* of some subject-matter, which, whenever and wherever binding upon any person, is equally binding upon *all* persons.' In contract, a judgment *in personam* is, 'in form as well as substance, between the parties claiming the right; and that it is so *inter partes* appears by the records itself.' *Woodruff v. Taylor*, 20 Vt. 65.

From all which it appears that a judgment *in rem*, at least when against anything, may bind the *res* in the absence of any personal notice to the parties interested; but a judgment *in personam*, as we have seen, can have no validity except upon service on the interested parties, or what is equivalent to it. Why was the Philadelphia action, in its nature, not a proceeding between parties claiming right to money due under the policy, rather than a proceeding to determine the *status* of such money. *If it was the former, then the efficiency of the judgment depended upon having the parties before the court so that these conflicting claims could be adjudicated;* (Italics ours); if the latter, then it would appear to be one wherein the court's judgment would have been effectual and conclusive without reference to whether the parties were before the court or not; and the rights of both of them could have been as well settled by the filing of a bill by the insurance company, and the bringing of the money into court, and without the presence, by service or appearance, of either of the parties claiming to be interested in the fund. It was not the *status* of any *particular money* that was to be determined; for any money which was a legal tender could have effectually satisfied the claim of the party receiving it; nor was there any claim primarily, by even the widow, much less the administrator, to any money *in specie;* nor did either company or the widow, at any time, claim or admit that the administrator had any money or property within the jurisdiction of the court, or valid claim to any subject-matter sought to be affected by the decree to be rendered. The proceeding was clearly one of interpleader, and that only. *We do not understand that an action in personam, simply because a debtor brings money, the right to recover*

> *which is in contention, and gives to the custody of the court a sum sufficient to discharge his debt, changes into an action in rem, or that an interpleader suit is, in its nature, a proceeding in rem.* (Italics ours.) In the Philadelphia case the company obtained a complete standing in court, if, with other proper averments, the pleader had alleged a willingness to bring the money into court. Manifestly, the action thus began would not have been *in rem.* Then, does the mere fact that the company, (the debtor), being sued, voluntarily delivers money to the clerk of the court, rather than keep it in its own safe, or to its credit in bank, or loaned upon call, change the action from one *in personam* to one *in rem?* We think not."

Cross v. Armstrong, supra, has been twice approved by this Court.

In *Leigh v. Green,* 193 U. S. 79, 48 L. Ed. 623, 628, this Court said:

> "When the proceedings are *in personam* the object is to bind the rights of persons, and in such cases the person must be served with process; in proceedings to reach the thing, service upon it and such proclamation by publication as gives opportunity to those interested to be heard upon application is sufficient to enable the court to render judgment. *Cross v. Armstrong,* 44 Ohio St. 613, 624, 10 N. E. 160."

Again, a still more important acception by this Court of the principles announced by the Ohio Court is found in *New York Life Insurance Co. v. Dunlevy,* 241 U. S. 518, 60 L. Ed. 1140, 1142, as follows:

> "The interpleader initiated by the company was an altogether different matter. *This was*

> *an attempt to bring about a final and conclusive adjudication of her personal rights.* (Italics ours), not merely to discover property and apply it to debts. And unless in contemplation of law she was before the court, and required to respond to that issue, its orders and judgments in respect thereto were not binding on her. *Pennoyer v. Neff*, 95 U. S. 714, 24 L. Ed. 565; *Shinn, Attachment & Garnishment*, Sec. 674. See *Cross v. Armstrong*, 44 Ohio St. 613, 623, 625, 10 N. E. 160."

A situation quite similar to the present case was passed upon in *Aetna Life Insurance Co. v. Lyon County*, 95 Fed. 325, at page 331, where it is said:

> "Much reliance is placed by the defendant upon a decree rendered in a case entitled *Anderson v. Insurance Co.* (Iowa) 55 N. W. 348, by the district of O'Brien County, Iowa, and affirmed on appeal by the state supreme court, which was a proceeding in equity brought by certain residents and taxpayers of O'brien county to restrain the county treasurer from making any payments on the bonds negotiated by B. L. Richards, and to have the bonds adjudged to be illegal and non-enforcable, and in which case a decree to that effect was entered. It is shown upon the record that in that case service of the original notice therein was not had upon any one of the complainants within the state of Iowa, they being all residents of other states, and no appearance therein was entered for any of the complainants except the Orient Fire Insurance Company, and therefore the decree therein is of no force against any of the complainants, except the Orient Company; it being well settled that, in personal actions, the service of notice by publication, or by

> reading the process to the party, at a place outside of the territorial jurisdiction of the court, confers no jurisdiction over the party thus served. *Pennoyer v. Neff*, 95 U. S. 714; *Hart v. Sonsom*, 110 U. S. 151, 3 Sup. Ct. 586. The adjudication in that case had no effect upon the rights of any of the complainants herein, except the Orient Company."

In *Brooklyn v. Aetna Life Insurance Co.*, 99 U. S. 362, 25 L. Ed. 416, Justice Harlan speaking for the Court said:

> "The suit commenced and determined in the Circuit Court of Lee County was a proceeding wholly *in personam*, against the holders and owners of bonds and coupons which had been issued in the name of the Town, and delivered to the Railroad Company. Upon principle and authority, no decree therein rendered could bind anyone not personally served with process, or who did not appear. It could not affect the rights of non-resident holders of bonds and coupons, proceeded against by constructive service. Such service, as to them, was ineffective for any purpose whatever. *Pennoyer v. Neff*, 95 U. S. 714, and authorities there cited."

To the same effect see:

Township of Empire v. Darlington, 101 U. S. 87, 25 L. Ed. 878.

Pana v. Bowler, 107 U. S. 529, 27 L. Ed. 424.

In two decisions, this Court has pointedly stated that "the foundation of jurisdiction is physical power:"

McDonald v. Mabee, 243 U. S. 90, 91, 61 L. Ed. 608, 609.

In the matter of Indiana Transportation Co., 244 U. S. 456, 457, 61 L. Ed. 1253, 1255.

Hence it follows that where the jurisdiction is *in personam*, such jurisdiction cannot exist unless founded on power over the person.

We submit that the Hamilton County Circuit Court was wholly lacking in power to enter a decree adjudicating respondent's rights under the certificates of deposit herein sued upon.

II

NO CONFLICT BETWEEN FEDERAL AND STATE COURTS

A. Question Stated.

The question of procedure upon which petitioner asserts a conflict between the Federal and State Courts was admirably stated and determined in the opinion of the Circuit Court of Appeals as follows:

> "It is contended by defendant in error that the effect of appealing from an interlocutory order by the plaintiff in error (defendant in the Corbett case) was a general appearance on its part in that case, and conferred jurisdiction over its person on the circuit court on the remand of the case. The rule in Florida, differing from that which obtains in the federal courts, is to the effect that an appellant, though objecting to the sufficiency of service successfully, is considered in court upon the return of the case to the lower court. Conceding that this court will follow the rule of decision in the state court, in passing upon a judgment in that court, we think the Florida rule did not apply in the Corbett case. The question of its applicability was suggested, but not decided by the Supreme Court of Florida in its opinion in that case, because the appellee asked that the appeal be decided on another ground. The Supreme Court held that—
>
> 'If the statute be followed, there is no right in the non-resident to quash this notice (by publication;) he has his right if not waived, to

object should the court thereafter commit an error against him.'

"The order of the circuit court was for that reason affirmed, apparently leaving the sufficiency and effect of the substituted service to be determined by the character of relief awarded against the non-residents upon final decree. The appeal was from an interloctury order of the circuit court, which affected only the question of service. *It was not an appeal from a final decree, upon which the insufficiency of service was assigned, with other error, as in the cases cited supporting the Florida rule.* (Italics ours). The Florida statute allowing appeals from interlocutory orders was held by its Supreme Court in the Corbett Case to cover an order affecting service only. No other question than the rightful presence of the non-residents in the circuit court by virtue of the substituted service was presented by the appeal.

"If the rule contended for applies to such an interloctury appeal, then the Florida Legislature and its Supreme Court did a futile thing in providing a method of appealing from an order of the circuit court sustaining service, where the taking of the appeal itself by the party complaining of service alone puts the party in court as effectually as if properly served, and renders the appeal ineffectual for any purpose. *We are not prepared* TO EXTEND THE RULE IN FLORIDA *as to the effect as an appearance of the taking of an appeal from a final decree, upon which error based on the insufficiency of service was relied upon with others, to an appeal from an* INTERLOCUTORY ORDER, WHICH INVOLVED ONLY THE QUESTION AS TO WHETHER THE APPELLANT WAS RIGHT-

FULLY IN COURT, *as in the Corbett case.* (Italics ours.)

"Conceding that there is no authority in the practice of Florida for special appeals, an appeal from an interlocutory order, questioning the sufficiency of service only, is authorized, and from this it is to be implied that an appellant is to derive some benefit from the appeal, which he could not do if the taking of the appeal constituted a general appearance on his part. It is not reasonably supposable that it was intended that the taking, as allowed by the statute, of an appeal from such an order as the one in question, should have the effect of depriving the appellant of the sole benefit sought to be obtained, or obtainable, by a resort to the remedy given. *In the absence of authority from the Florida Supreme Court, applying the general rule to the case of* SUCH AN INTERLOCUTORY APPEAL, *common sense requires us to decline to make the application.* (Italics ours). This contention is made by defendant in error, though there was a stipulation in the state court case, that the supersedas should not constitute a general appearance."

It would be difficult indeed to state in clearer or plainer language than is done by the sentences italicized in the foregoing quotation, the reasons why there is no conflict between the Federal and State Courts.

B. UNDERLYING PRINCIPLES.

There can be no question of respondent's right to have entered the special appearance in the State

Court and that such special appearance did not constitute a general appearance:

Standley v. Arnow, 13 Fla. 361;
Tidwell v. Witherspoon, 18 Fla. 282;
Seacoast Lumber Co. v. R. J. and B. F. Camp Lumber Co., 63 Fla. 604;
Harkness v. Hyde 98 U. S. 476, 25 L. Ed. 237;
Davis v. Cleveland, C. C. & St. L. R. Co., 217 U. S. 157, 54 L. Ed. 708.

Let us next examine what character of participation appears by respondent in these chancery cases after respondent's motions to quash service had been denied. Going a trifle outside the record in this particular case, and inspecting the records in the four companion cases now before this Court, it will be found that there were sixteen of these Chancery cases and that in fourteen of the cases stipulations were entered into, all of which substantially provided:

"That proceedings in this cause be stayed pending the prosecution of an appeal from the orders of the court overruling the motions of the said defendant to quash service in the case of J. H. Corbett vs. Rome Insurance Company, et. al., which said case is now on trial and being prosecuted in this Court.

"That the ultimate decision of the said appeal in said case of J. H. Corbett vs. Rome peal in said case of J. H. Corbett vs. Rome Insurance Company shall be decisive of the validity of the service by publication on said defendants in this case, and if the service in the said Corbett case be ultimately held defective, and ordered quashed, then the service in this case, the validity of which involves

identically the same legal questions as that in the Corbett case, shall be held defective and shall be quashed; and

" That *this stipulation of Counsel shall not be considered as constituting a general appearance of the said defendants in this cause;*"

Respondent was one of the defendants referred to in this stipulation.

For some reason petitioner now completely ignores the portion of this stipulation above italicized. This portion of the stipulation is especially noteworthy in view of the second stipulation entered into by petitioner's then counsel, together with a pointed statement in the opinion of the Supreme Court of Florida.

In the remaining two of these sixteen Chancery suits, "special appeals" were taken to the Supreme Court of Florida from the interlocutory orders of the Chancellor denying the motions to quash service. These cases are known as *Rome Insurance Co. et. al. vs. Corbett*, 66 Fla. 438 and *Rome Insurance Co. et. al. vs. Carter*, 66 Fla. 441.

In these appealed cases, were filed the stipulation with reference to respondent's application for supersedeas not constituting a general appearance. (Page 4 of this brief).

This second stipulation, petitioner now also completely ignores. Here again is forcibly exhibited the fact that petitioner's present counsel are strangers to the State Court cases. These counsel did not live with those cases, and, whatever the cause may be, do not display an understanding of them. The counsel who represented petitioner in the State Courts did not attempt to violate any of these stipulations before

the Florida Supreme Court. Note the following from that Court:

> "It may well be that this appeal so operates as a general appearance in the circuit court, as to render the question before us a moot one, *but the appellee does not ask us so to hold.*" Italics ours) *Rome Ins. Co. v. Corbett*, 66 Fla. 438, 439.

Section 1908, *General Statutes of Florida*, allows an appeal from interlocutory decrees in chancery. This statute reads:

> "From interlocutory decrees. Appeals may be taken and prosecuted from any interlocutory order, decision, judgment or decree of the circuit courts of this state, when sitting as courts of equity; but the conferring of the right shall not be construed so as to deprive either party from deferring and postponing the entry of his appeal until after the entry of the final decree, or end of the cause as prescribed by law; nor shall such postponement of the appeal be decreed, held or taken to be an acquiescence in the propriety of any interlocuotry order or decree made in the progress of the cause, or any waiver of any error therein."

Section 1906, *General Statutes of Florida*, provides:

> "Appeals in chancery shall be matters of right."

A ruling that the defendant is properly in Court

in such an order as may be appealed from. *Agnew v. Adams*, 24, S. C. 86.

Therefore when respondent exercised its "right" to appeal from the interlocutory orders of the Circuit Court over-ruling its motion to quash service, and when every pleading or paper which respondent filed in prosecuting said special appeal was emphatically limited to a special appearance, we submit that it entered a true special appeal analogous to a special appearance in a lower court, and that such an appeal does not constitute a general appearance. To hold that such an appeal did constitute a general appearance would be to deprive respondent of the "*right*" to appeal expressly given it by Statute.

In the declaration of rights of the *Constitution of Florida*, Section 4 provides:

> "SECTION 4: All courts in this state shall be open, so that every person for any injury done him in his lands, goods, person or reputation shall have remedy, by due course of law, and right and justice shall be administered without sale, denial or delay."

To hold the prosecution of the special appeal to constitute a general appearance would be to place a penalty on the exercise of the *right* to appeal. Such a holding would be a denial of justice.

A judgment of a Court upon its own powers ought never to be final, or else a court would be empowered, however limited its jurisdiction, to take upon itself unbounded jurisdiction.

Respondent is entitled to have the law laid down correctly. If the Hamilton County Court proceeded erroneously under the service attempted

to be had upon respondent in the chancery cases, respondent has the right to be protected from such erroneous orders. The *right* is given by statute, though this statute would, from the standpoint of justice, appear to be merely declaratory of the common law, using common law in its broad sense. For *is not the object of law the protection rather than the over-throw of legal rights?*

The crucial test is this: How could a court of justice come to the conclusion that the orders of the Florida Circuit Court specially appealed from were erroneous, and then declare that the presenting of these erroneous orders to the Supreme Court of Florida for the purpose of having them corrected, completely nullified the effect of the correction? How could a judicial tribunal announce the law to be that these special appellants had been subjected to erroneous orders of the Florida Circuit Court, and in the same breath say that their ascertaining this fact deprived them of any benefit therefrom? If insufficient service had been made upon the special appellants, why should they be punished for attempting to demonstrate that fact? *Why should the special appellants be penalized for insisting on their rights?* We insist that the only answer to these questions which will be in harmony with the declaration in Section IV of the Bill of Rights of the Florida Constitution, that justice shall not be denied, is to hold these chancery appeals to be true special appeals, and that their prosecution did not constitute a general appearance. *To enforce a right should not be to lose it.* This would be contrary to natural justice.

True it is that special appellants filed several

papers in the Supreme Court of Florida, as well as in the Circuit Court of Hamilton County. But they did nothing which was unnecessary in order to protect their rights and to enable them to go before the Florida Supreme Court to present the orders of the Circuit Court specially appealed from. Special appellants were not responsible for the fact that so many papers must be filed in order to prosecute an appeal. Because special appellants have complied with the requirements of the law for prosecuting an appeal could be no ground for declaring that they have entered a general appearance.

The fact that special appellants had information of these chancery suits cannot of itself affect in any way the question of what constitutes a general appearance. A defendant in making a motion to quash service in the Circuit Court has just as much information of the suit as had special appellants of these suits in which they prosecuted special appeals. The mere fact that special appellants had information of the suit and moved to quash service did not bring them into Court, provided the pleadings had been limited to a special appearance.

The question is not, was respondent informed of the chancery suits, but is, had it been legally service with process? If every sheriff in the State of Florida had gone to Georgia and delivered a copy of a subpoena to appear in this suit personally to each officer and director of respondent bank and read the subpoena to each of these officers, this would not constitute service. It would, however, have been information. In *National Metal Co. v. Greene Consolidated Copper Co.*, 11 Ariz. 108, 89 Pac. 535, 9 L. R. A. (N. S.) 1062, it is pertinently said:

"Where there is no service, there is no notice, irrespective of any knowledge which the defendent may acquire informally. Notice is given only by a service of process. Informal knowledge will not supply it, and cannot be relied upon to put the one acquiring the knowledge upon notice, or to force him into court to defend himself. The Supreme Court of the United States recognized this in *Connecticut Mut. L. Inc. Co. v. Spratley*, 102, U. S. 612, 43 L. Ed. 572, 19 Sup. Ct. Rep. 308. After reference to certain notices provided to the company, it is said: 'We do not intimate that mere knowledge or notice as thus provided would be sufficient without a service on the agent in the state where suit was commenced.' Again: 'Process sent . . . . (to a non-resident) out of the state, and process published within it, are equally unavailing in proceedings to establish his personal liability.' *Pennoyer v. Neff*, 95 U. S. 727, 24 L. Ed. 570. Still further: 'No court can exercise, at common law, jurisdiction over a party, unless he is served with the process within the territorial jurisdiction of the court, or voluntarily appears.' *Mexican C. R. Co. v. Pinkney*, 149 U. S. 209, 37 L. Ed. 705, 13 Sup. Ct. Rep. 865. 'It is not sufficient,' says *Alderson* in *Judicial Writs & Process*, pp. 227, 228. Sec. 111, 'That a defendant have actual notice (knowledge) of a proceeding against him; he must be summoned in a legal manner.' The point we are making is clearly pointed out again by the Supreme Court of the United States in *Fitzgerald & M. Constr. Co. v. Fitzgerald*, 137 U. S. 98, 34 L. Ed. 608, 11 Sup. Ct. Rep. 39, as follows: 'So that, whether the president of the company was inveigled into Lancaster County or not, the service upon him amounted to more than an informal notice on-

> ly, and did not bring the company into court, and this the company was bound to know, and must be held to have known. Without regard to the evidence relied on to show that there was concealment of the circumstances in relation to the service, knowledge of these circumstances was wholly immaterial, in view of the fact that the service was unavailing to bring defendant into court unless it chose to come there."

Furthermore, we can no more construe the purpose and effect of a pleading or other paper filed in a suit by looking only to a portion of it, than we can interpret any other written instrument by picking out only selected portions. Pleadings, like contracts, deeds, wills, statutes, court orders, and judicial opinions, are to be construed by looking at the four corners of the document. It may be, perchance, and not infrequently is, determined that a pleading when so examined is held to be a nullity. But no court can add to or detract from a pleading any more than it can add to or detract from the terms of any other written instrument.

When we look at every pleading, paper, or even bond filed by special appellants in the Supreme Court of Florida, it becomes apparent that these pleadings and other papers were and could only be one of two things:

(1st) They were either so limited that they could not do other than amount to a special appeal —their definite limitations would absolutely stand in the way of their amounting to a general appearance, or

(2nd) The limitations conspiciously written

into these papers were so drastic that the papers were a nullity.

When the Florida Supreme Court accepted the transcripts of record, and rendered its decision based thereon, it decided that the pleadings etc., were not nullities; but neither the Florida Supreme Court nor any other Court could re-write these pleadings or make them other than what the parties had made them. Therefore the Florida Supreme Court must be held to have accepted these transcripts as filed in and amounting to a special appeal. The Florida Supreme Court certainly did not hold otherwise, for they expressly stated that:

> "These non-residents have sued out *what they term a special appeal.* (Italics ours.)
>
> "It may well be that this appeal so operates as a general appearance in the Circuit Court, as to render the question before us a moot one, but the appellee does not ask us to so hold, and it appears that this is but a test case, upon the decision of which many other cases in that court are depending." *Rome Insurance Co. vs. Corbett*, 66 Fla. 438, 439.

Moreover, the then counsel on the other side were convinced of the soundness of our position.

Special appeals of this character are not new, and so far as we have been able to find authorities upon this point, they are uniform in holding that such an appeal does not constitute a general appearance.

> *Columbia Screw Co. v. Warner Lock Co.*, 138 Cal. 445, 71 Pac. 498.
>
> *Freer v. White*, 91 Mich. 74, 51 N. W. 807;

Craighead v. Martin, 25 Minn. 41;
Hurlburt v. Palmer, 39 Neb. 158, 57 N. W. 1019;
Lyons v. Miller, 2 N. D. 1, 48 N. W. 514;
Paxton v. Daniel, 1 Wash. St. 19, 23 Pac. 441;
Dikeman v. Mrotek, 76 Wis. 332, 45 N. W. 118.

Freer v. White, supra, is specific authority for a "special appeal." Said the Court in that case:

> "After the *SPECIAL APPEAL* was taken to the circuit court, defendant's attorney, Mr. Sweezey, caused his appearance to be entered in that court, and it is claimed that this was a waiver of the defect, and conferred jurisdiction upon the court to proceed with the case. But when it is considered in connection with the *SPECIAL APPEAL it would be presuming against the fact to assume that there was any intention on the part of the defendant to submit himself to the jurisdiction of the court.*" (Italics ours).

"*Non potest adduci Exceptio ejusdem Rei cujus petitur Dissolutio.*" (A matter, the validity of which is at issue in legal proceedings cannot be set up as a bar thereto). *Broom's Legal Maxims*, 8 ed. 133.

C. First Distinction Between State and Federal Rulings—No Voluntary Appeal.

Petitioner refers to the holdings of the Florida cases to the effect that:

> "As the appellant has made herself a party to the suit by *voluntarily* (italics ours) ap-

> pearing and prosecuting her appeal, she must, upon the return of the cause to the Circuit Court, be considered as regularly before the court in like manner as if she had been duly served with process," *Standley v. Arnow*, 13 Fla. 361.

We call attention to just what was announced in *Standley vs. Arnow, supra.* The Court states that since appellant made herself a party to the suit by voluntarily appearing, etc., she must be considered as regularly before the court. *The word* VOLUNTARILY *marks one of the distinguishing features between all holdings of the Florida Court, and the present case.* Special appellants showed as far as it was possible to be shown, that they had not voluntarily appeared, either in the lower or the appellate court. They no more voluntarily appeared to prosecute their special appeal than they did when they entered their special appearance in the lower Court and moved to quash service. The one cannot constitute a voluntary or general appearance more than the other.

To show how the subsequent Florida cases dealing with the question of an appeal constituting a general appearance are founded on *Standley vs. Arnow*, we quote from these latter cases:

In *Tunno & Jessup & Co. v. Robert*, 16 Fla. 738, on page 751 the Court says:

> "The persons composing the firm of M. K. Jessup & Co., having appeared upon this appeal in this court, upon the return of the cause to the Circuit Court must be considered as regularly before this Court in like manner

as if duly served with process. 13 Fla. 368; 1 Pike 50, 376, 386, 405; 4 Bibb 84, 167."

In this case the reference to 13 Fla. 368 is to the quotation taken above from *Standley vs. Arnow.*

In *Shrader v. Shrader*, 36 Fla. 502, on page 518 the Court says:

"Mrs. Shrader, the appellant in Case No. 2 having by her appeal made herself a party to such case, should proceed to plead to the bill of complaint therein. *Standley vs. Arnow*, 13 Fla. 361."

In *Wylly v. Sanford Loan & Trust Co.*, 44 Fla. 818, 820, the Court says:

"The appeal of the defendants operated as an appearance in the cause however, which will enable the Court below now to proceed in the matter. *Standley vs. Arnow*, and *Finlayson v. Lipscomb, supra.*"

The reference to *Finlayson v. Lipscomb* in the last quotation is meant to be the case of *Tunno & Jessup & Co. v. Robert.* This is shown by looking up the citation given for *Finlayson v. Lipscomb* earlier in the opinion in *Wylly v. Sanford Loan & Trust Co.*

In *Rumeli v. City of Tampa*, 48 Fla. 112, on page 114 the Court says:

"The appeal of the defendant Rumeli operated as an appearance in the cause, however, which will enable the Court below to proceed in the matter. *Wylly v. Sanford Loan & Trust Co.*, 44 Fla. 818."

This case as seen follows point-blank *Wylly v. Sanford Loan & Trust Co.*, which in turn follows *Standley v. Arnow* and *Tunno & Jessup & Co. v. Robert. Tunno & Jessup & Co. vs. Robert* has been seen to refer directly back to *Standley v. Arnow.*

Thus we see that *Standley v. Arnow, supra,* is the case which each subsequent Florida case either cites directly as the authority for its holding, or is the case to which each of these subsequent cases leads back as its basis.

Petitioner contends that the special appearance was a "voluntraily" proceeding though presenting not a single authority in support thereof.

The authorities seem to be unanimous that *such a proceeding is not voluntary.*

In *Craighead v. Martin*, 25 Minn., 41, it is said:

> "It would seem too plain for argument that such an act, which in itself is a denial of all authority in the justice cannot be regarded as a voluntary appearance, and express recognition of his authority."

In *Freer v. White*, 91 Mich. 74, 51 N. W. 807, the Michigan Court pertinently said:

> "It would be presuming against the fact to assume that there was any intention on the part of the defendant to submit himself to the jurisdiction of the court."

In *Pugh v. Loisel*, 219 Fed. 417, 424, (5th C. C. A.) is the following:

> "He is not to be held to have voluntarily submitted himself to the jurisdiction of that

court by protesting against its exercise of jurisdiction. *Big Vein Coal Co. v. Read*, 229 U. S. 31, 33 Sup. Ct. 694, 57 L. Ed. 1053."

This last Court again in *Smith v. Government of Canal Zone*, 249 Fed. 273, 278, said:

> "This appellant's admission of the court's jurisdiction, or consent to the exercise of it, is not to be inferred or implied from a previous explicit denial of its jurisdiction, though such denial was based upon grounds other than the one stated in the motion to set aside the service of process. *A denial of jurisdiction is not to be given effect as an admission to it.* (Italics ours). *Big Vein Coal Co. v. Read*, 229 U. S. 31, 33 Sup. Ct. 694, 57 L. Ed. 1053; *Pugh v. Loisel*, 219 Fed. 417, 135 C. C. A. 221."

In *Harkness v. Hyde*, 98 U. S. 476, 478, 25 L. Ed. 237, this Court said:

> "Illegality in a proceeding by which jurisdiction is to be obtained is in no case waived by the appearance of the defendant for the purpose of calling the attention of the court to such irrregulariy."

This Court further said *In the matter of Indiana Transportation Co.*, 244 U. S. 456, 458, 61 L. Ed. 1253, 1255:

> "Persons by becoming suitors do not place themselves for all purposes under the control of the Court."

D. SECOND DISTINCTION BETWEEN STATE AND FEDERAL RULINGS—NO ADJUDICATION OR CONTEST ON MERITS.

Special appellants in no way contested the chancery suits on the merits. They appeared specially for one purpose only. This purpose was to settle the question of service. No other question has been raised by any of the defendants. There had been no adjudication whatever on the merits.

Jurisdiction is founded upon service, or, as the Federal Supreme Court says, upon "physical power" which is obtained only by due service of process. The first question to be settled in any case is that of jurisdiction. Said this Court in *Heald vs. District of Columbia*, decided November 8th, 1920:

> "As the want of power in the court below to make the certificate has been suggested, and as that naturally arises on the face of the record, and will, if well founded, preclude present inquiry into further questions, we come to consider that suggestion."

And we also quote from the dissenting opinion of Mr. Justice Baldwin in *Ex Parte Crane*, 5 Pet. 190, 200, 8 L. Ed. 92, 96 as follows:

> "As the first question which this motion presents is one of jurisdiction and power of this court to grant the writ prayed for in this case, it will be following the rule established to consider it first (3 Cranch. 172; 1 Peter's Condensed Reports. 159; 5 Cranch. 221; 10 Wheaton. 20; 1 Cranch. 91; 9 Wheaton, 816): a rule which

never ought to be disregarded where a question of power arises."

Courts will settle questions of jurisdiction, whenever possible, preliminary to entering upon the cause. This is precisely and solely what the present respondent requested of the Court in the chancery cases. After the chancery Court assumed to go into the merits of those cases, the present respondent refrained from the slightest participation.

In each of the cases cited by petitioner in which the Florida Supreme Court held an appeal to constitute a general appearance, the appeal was upon an adjudication of the merits of the case, and not merely upon a ruling on the question of service—with the single exception of the case of *Rome Insurance Co. v. Corbett* which is the decision we are here analyzing and which we are emphatic in asserting does not hold what petitioner contends (pages 28 and 34 of this brief.

In *Rumeli v. Tampa*, 48 Fla. 112, 37 Sou. 563, the appeal was from a final decree although this is not clear from the report of the case. We quote from a letter written by the Clerk of the Florida Supreme Court:

> "The record in the case of *Rumeli v. City of Tampa*, 48 Fla. 112, shows that Judge Wall entered a final decree in said cause November 7, 1903, a decree *pro confesso* having been entered therein November 2, 1903. The final decree purported to run against Rumeli as well as against the other defendants named in the bill."

It thus appears that, without a single exception,

in every case in which the Florida Court held an appeal to constitute a general appearance, the appeal was taken after entry of final decree.

A second distinction between this Corbett case and all other Florida cases is the lack, in the Corbett appeal, of any adjudication or contest whatsoever on its merits.

Furthermore five of the cases cited by counsel are decisions on writs of error at common law, and are not in point.

These cases are:

> *Drew Lumber Co. v. Walter*, 45 Fla. 252;
> *Hayman v. Neil*, 53 Fla. 127;
> *Barnick v. Rouse*, 53 Fla. 643;
> *Busard v. Hutson*, 65 Fla. 479;
> *Henry v. Spitler*, 67 Fla. 146.

Unlike Florida chancery practice allowing appeals from interlocutory orders (page 28 of this brief), common law writs or error are allowed in Florida only after final judgment.

Section 1691 of the General Statutes of Florida reads:

> "*Writs of error—only from final judgments*: Writs of error shall lie only from final judgments except as specified in Section 1695."

Section 1695 of the Florida General Statutes, referred to in the section just quoted, allows writ of error to the party aggrieved by the granting of a motion for new trial, without waiting for final judgment. Even so a writ of error follows a contest on the merits.

That an appeal solely upon questions of service or jurisdiction over a defendant is not a general appearance, see cases collated on pages 34-35 of this brief.

E. REAL HOLDING OF FLORIDA COURT.

The Florida Supreme Court did not hold the so called constructive service to be a valid service, nor the special appeal to be a general appearance. What it did hold was that this so called service was a mere notice, (meaning mere information,) which may be paid attention to or not, as the defendant may choose. Said the Florida Court:

> "The purpose of the statute authorizing constructive service by publication is to notify non-residents of the pending suit so that they may if they care to do so, come into the case, and if the statute be followed, there is no right in the non-resident to quash this *notice;* he has his right if not waived, to object should the court thereafter commit an error against him," (italics ours) *Rome Ins. Co., et. al. vs. Corbett,* 66 Fla. 438, 440.

Therefore, the most that can be said is that respondent received a notice or was informed that sixteen chancery suits had been brought against it, which notice or information was lawfully given. This notice or information to respondent did not give the chancellor "physical power" *in personam* over respondent.

The giving of this notice or information is not

"confined in its operation to the cases where the court might make final decree or judgment.... It was not intended that the question of the power to enter the ultimate decree or judgment should enter into the question of the right to give notice of the suit to a non-resident..... We are not to assume upon the face of the bill that the Circuit Court will enter an unauthorized decree." Quoted from *Rome Ins. Co. vs. Corbett*, 66 Fla. 438.

But the Circuit Court of Hamilton County did proceed to enter an unauthorized decree—a decree beyond its power to enter—a decree falling within that class of cases in which a mere notice or information of suit to a non-resident does not permit of the making of a final decree or judgment. Such a decree is just as much a nullity, as was the judgment held void in *Pennoyer v. Neff*, 96 U. S. 714, 24 L. Ed. 565.

There is no presumption in favor of jurisdiction, where the service is constructive and the defendant a non-resident. In *Myakka Co. v. Edwards*, 68 Fla. 382, the Supreme Court of Florida held:

> "Jurisdiction must be affirmatively shown by the record where the parties defendant are shown to be non-residents and constructive service is depended upon for jurisdiction."

III

FEDERAL COURT ENTITLED TO EXERCISE ITS OWN INDEPENDENT JUDGMENT

A. Upon Questions of Service Upon Non-Residents.

Had there existed such conflict as petitioner contends, the Federal Court should exercise its own independent judgment upon the validity and effect of service of process attempted by the Florida State Court upon this respondent foreign corporation bank. The Courts of the United States will not leave a foreign corporation to the mercy of the decisions of State Courts respecting the validity and effect of a purported service, either actual or constructive:

Goldney v. Morning News, 156 U. S. 518, 39 L. Ed. 517.
Barrow Steamship Co. v. Kane, 170 U. S. 100, 111, 42, L. Ed. 964, 968.
Conley v. Mathieson Alkali Works, 190 U. S. 406, 47 L. Ed. 113;
Mechanical Appliance Co. v. Castleman, 215 U. S .437; 54 L. Ed. 272;
Riverside & D. R. Cotton Mills, v. Menefee, 237 U. S. 189, 59 L. Ed. 910;
Meisukas v. Greenough Red Ash Coal Co., 244 U. S. 54, 61 L. Ed. 987.

We would also refer to the recent pertinent statement of Mr. Justice McKenna in *Chipman, v. Thomas B. Jeffrey Company*, 251 U. S. 373, 64 L. Ed. 314:

"In resting the case on New York decisions

we do not wish to be understood that the validity of such service as here involved would not be of Federal cognizance, whatever the decision of a state court, and refer to *Pennoyer v. Neff*, 95 U. S. 714, 24 L. Ed. 565; *St. Louis Southeastern R. Co. v. Alexander, supra, Philadelphia & R. R. Co. v. McKibbin*, 243 U. S. 264, 61 L. Ed. 710; 37 Sup. Ct. Rep. 280; *Meisukas v. Greenough Red Ash Coal Co.* 244 U. S. 54, 61 L. Ed. 987, 37 Sup. Ct. Rep. 593; *People's Tobacco Co. v. American Tob. Co.* 246 U. S. 79, 62 L. Ed. 587, 38, Sup. Ct. 223, Ann. Cas. 1918 C, 537."

B. Upon Rights Under Negotiable Instruments.

Furthermore, the rights of holders of commercial paper are here involved, and in such cases the Courts of the United States exercise their own independent judgment:

Pana v. Bowler, 107 U. S. 529; 27 L. Ed. 424;
Presidio County v. Noel-Young Bond & Stock Co., 212 U. S. 58, 73; 53 L. Ed. 402, 408;
Rollings v. Lake County, 34 Fed. 845, per Brewer, J;
Bank of Edgefield v. Farmers Cooperative Mfg. Co., 52 Fed. 98, (5th C. C. A.)
Town of Newberne v. National Bank of Barnesville, Ohio, 234 Fed. 209, (6th C. C. A.)

The property right of the holder of a negotiable instrument is different from the right of the owner of real property or other personal chattels, as pointed out in *Town of Enfield v. Jordan*, 119 U. S. 680, 693, 30 L. Ed. 523, 529:

"Rights to real property and personal chattels within the jurisdiction of the court, and subject to its power, may be affected by *lis pendens*, but not those acquired by the transfer of negotiable securities or by the sale of articles in market overt in the usual course of trade."

Said Mr. Justice Story in *Swift v. Tyson*, 16 Peters 1, 19, 10, L. Ed. 865, 871:

"The law respecting negotiable instruments may be truly declared in the language of Cicero, adopted by Lord Mansfield in *Luke v. Lyde*, 2 Burr, R. 883, 887, to be in a great measure, not the law of a single country only, but of the commercial world. *Non erit alia lex Romae, alia Athenia, alia nunc, alia posthac, sed et apud ommes, gentes et omni tempore, una eademque lex obtinebit.*"

CONCLUSION

Penetrating the veil of pleading, the controlling facts are simply;

(a) Respondent, a citizen and resident of Georgia, held the promissory note of petitioner, a citizen and resident of Florida;

(b) Suit was brought against petitioner and respondent in Florida by a third party alleging respondent's negotiable instrument was obtained by fraud and was void.

(c) Service by publication was attempted upon respondent;

(d) Decree was entered declaring respondent's promissory note void.

The intervention of the third party as complainant in the Florida suit is not an important detail. If the third party could sue, petitioner itself would equally have been entitled to sue.

If the State Court decrees should be held good by this Court, no greater blow would ever have been dealt negotiable instruments. If these decrees are good, every holder of such paper given by a citizen of a foreign State is subject to the possibility, when payment is demanded, of being met with a decree of a Court of the debtor's State, entered solely upon constructive service, declaring that the payee holds a mere scrap of paper, void and uncollectable. It is submitted that such cannot be the law.

Respectfully submitted,

W. E. KAY,

J. L. DOGGETT,

L. A. DEAN,

HENRY C .CLARK.

Attorneys and Counsel for Respondent.

IN THE

Supreme Court of the United States

THE BANK OF JASPER, A CORPORATION *Petitioner*	October Term, 1921
VERSUS	
FIRST NATIONAL BANK OF ROME, GEORGIA, A CORPORATION *Respondent*	No. 76

SUPPLEMENTAL BRIEF FOR RESPONDENT

Petitioner's brief was not prepared in time to permit reply thereto in Respondent's main brief. Hence this supplemental brief.

I.

If Respondent had delayed appealing from the order of the Circuit Court of Hamilton County, Florida, until after final decree, then the discussion on pages 16 *ea seq* of Petitioner's brief might have some applicability.

The distinction between the special appeals under consideration and all appeals held by the Florida

Supreme Court to constitute a general appearance, may be made more sharply apparent by an illustration. Respondent did not come *in contact with* the merits of the State Court cases. The "merits" of those cases may be likened to an electric wire. If no contact with the wire occurs, no harm is done. Respondent's special appeals not having come in contact with the merits are unharmed. Stretching the adjudications of the Florida Supreme Court to their limit, the most they hold is that *by coming in contact with the merits of the case through an appeal* AFTER A FINAL DECREE, *the question as to service is electrocuted.*

The Florida Supreme Court in *Rome Insurance Company et al, v. Corbett*, 66 Fla. 438, so to speak, played with the matter of these "Special Appeals" constituting a general appearance, but let it go. The Florida Supreme Court in the Corbett case recognized that that case presented a situation different from those cases in which the appeal had been held to constitute a general appearance.

II.

The inapplicability of garnishment cases to the instant case is well shown by *Pennington v. Fourth National Bank*, 243 U. S. 269, 61 Law. Ed. 713, which is cited and relied upon on pages 53 and 55 of Petitioner's brief. That case presented merely a form of garnishment in equity. If Mrs. Pennington's application for an order of Court to tie up her husband's bank account in the Fourth National Bank had denied that such an account existed and had denied that her husband had any money in the Fourth National Bank, is it to be supposed the

Court in the face of such an application would have entered an order against the Bank restraining it from paying money to the husband?

A denial in a bill that funds exist cannot support a prayer in the same bill that payment of the same identical funds be enjoined.

Mrs. Pennington was declared to be a creditor of her husband and therefore entitled to garnish his bank account. *The Complainants in the Florida State Court cases were not creditors* in any sense of the term. *They were debtors* undertaking to avoid their debt.

We have in Florida a statute providing for EQUITABLE GARNISHMENT. This is Section 1948 of the General Statute of Florida and reads:

> PROCEEDINGS PRESCRIBED. — If any suit shall be commenced for relief in equity in any court against any defendant residing out of this State, and any other defendant within the same having in his hands effects of, or being otherwise indebted to, such absent defendant, and the appearance of such absentee be not entered and security given to the satisfaction of the court for performing the decree, upon affidavit that such defendant is out of the State, or that upon inquiry at his usual place of abode he cannot be found so as to be served with process, the court may make an order and require surety, if it shall appear necessary, to restrain the defendant in this State from paying or conveying away, or secreting the debts by him owing to, or the effects in his hands, of such absent defendants, or to restrain the absent defendant from conveying away or secreting or removing the property in litigation, or make an order sequestrating the property which may be neces-

sary to secure the plaintiff if he finally succeeds; and may order such debts to be paid, and effects to be delivered up to said plaintiff, upon his giving sufficient security for the return thereof.

"Service upon the absent defendant shall be had in the manner provided by law, and if the defendant does not appear and answer, plead or demur to the bill, decrees pro confesso and final decree may be ordered as in other cases; and the court shall make an order requiring the complainant to give security, to be approved by the court or by its clerk, for abiding such future orders as may be made for restoring the estate or effects to the absent defendant upon his appearance and answering the bill; and if the complainant shall refuse to give or not be able to procure such security, the effects shall remain under the direction of the court, in the hands of a receiver, or otherwise, for so long a time, and shall be disposed of in such manner, as to the court shall seem fit."

Respondent's counsel gave careful study to this Statute when the State Court suits were first filed, and by reason of the emphatic denials in the bills that any debt existed saw clearly that the Statute did not support the bills in any particular.

III.

Petitioner argues that Respondent did not question the effect of the State Court decrees in the Federal District Court and states that the only ground of demurrer which in any way could have done this was the first ground of the demurrer to the pleas in question. See page 76 of Petitioner's brief.

The last ground of this demurrer specifically

raises the very point mentioned. This ground of demurrer reads:

> "No decree entered in said chancery suit could effect the rights of the plaintiff herein arising out of the certificate of deposit set up in said court." (R43)

Again each replication which Respondent filed to said pleas concludes with language to the following effect:

> "Wherefore this plaintiff says that no decree entered in said chancery suit of C. L. Adams vs. Rome Insurance Company et al., could effect or take away any of the rights of the plaintiff herein, arising out of the certificate of deposit herein sued upon." (R 46)

The ground work of Respondent's position from the inception of the State Court cases has been the principles laid down in *Pennoyer vs. Neff*, 95 U. S. 714, 24 L. Ed. 565 and *Hart vs. Samson*, 110 U. S. 151, 28 L. Ed. 101.

Respondent's theory has been consistent and unaltered in every argument from first to last throughout the various stages of this litigation. The Federal District Court had squarely presented to it not only in the argument but in the pleadings, as above shown, the very propositions which Respondent now contends for and has contended for throughout.

Respectfully submitted,

W. E. KAY,
J. L. DOGGETT,
L. A. DEAN,
HENRY C. CLARK,
Attorneys and Counsel for Respondent.

FILED
JUN 7 1920
JAMES D. MAHER
CLERK

Supreme Court of the United States

October Term 1919

No. 9[redacted]77

THE BANK OF JASPER,
Petitioner,

VERSUS

THE STATE BANK OF ROME,
Respondent.

PETITION FOR WRIT OF CERTIORARI AND BRIEF IN SUPPORT THEREOF

F. P. FLEMING,
Attorney and of Counsel for Petitioner.

THE DREW PRESS, JACKSONVILLE 3041908

In the Supreme Court of the United States

October Term 1919

THE BANK OF JASPER, a corporation,
Petitioner,

vs.

THE STATE BANK OF ROME, a corporation,
Respondent.

PETITION FOR WRIT OF CERTIORARI

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

The petition of The Bank of Jasper, a corporation, respectfully shows unto this Honorable Court as follows:

First: This cause involves a conflict between the Supreme Court of the State of Florida and the United States Circuit Court of Appeals in and for the Fifth Circuit.

Second: This cause was instituted against your petitioner in the United States District Court in and for the Southern District of Florida on the 27th day

of January A. D. 1913, by the respondent, American Bank and Trust Company (now known as The State Bank of Rome) seeking to recover on certain certificates of deposit issued by your petitioner, (Transcript p. 1). The jurisdiction of the trial court was based on diversity of citizenship, (Transcript, p. 3).

Third: Prior to the institution of this action in the United States District Court as aforesaid, on, to-wit, the 3rd day of January, A. D. 1913, there were filed in the Circuit Court, in and for Hamilton County, Florida, a court of general jurisdiction, bills of complaint by W. S. Murrow and G. R. Brown, in separate suits, against Rome Insurance Company, American Bank and Trust Company, (the original plaintiff in this suit) and against your petitioner (Transcript pp. 9, 11, 36 and 50); that in and by said bills of complaint it was prayed that certain certificates of deposit, (being the same certificates of deposit sued on in this cause) be declared to be null and void, and that your petitioner be restrained from paying the proceeds thereof to American Bank and Trust Company or any one for it, (Transcript pp. 36 to 46; 50 to 59); that said certificates of deposit (Transcript pp. 5, 6 and 7), are in words and figures as follows, to-wit:

"No. 320.

"The Bank of Jasper,

$4,704.00

"Jasper, Florida, Nov. 28, 1911.

"American Bank & Trust Company, Trustee, of Rome, Ga., has deposited in this bank Forty-seven Hundred, four and NO/100 Dollars, payable to the order of itself with interest at rate of 4% per annum compounded quarterly,

on the return of this certificate properly indorsed on or after Nov. 28, 1912.

"Not subject to check.

"W. S. MURROW, Cashier.

"Copy.

"Certificate of Deposit.
(Indorsed on back)
Without recourse, American Bank
& Trust Co., Trustee,
by T. J. Simpson, Vice Pres.

American Bank & Trust Co.,
Rome, Ga.
By S. F. Magruder, Cashier.

The Hamilton National Bank,
by C. H. Preston, Cashier.
Pay Atlantic National Bank
Jacksonville, Fla., or order
First National Bank, Cincinnatti, Ohio.
T. J. Davis, Cashier.
Report No. 17343.

"Pay to the order of any bank or banker
coll Nov. 15, 1912, Dept.
63-2 63-2
The Atlantic National Bank,
Jacksonville, Fla.,
D. D. Upchurch, Cashier.

"9. "No. 321.

"The Bank of Jasper,

"$294.00
305.94

"Jasper, Fla., Nov. 29, 1911.

"American Bank & Trust Company, Trustee, of Rome, Ga., has deposited in this Bank Two Hundred Ninety Four and No/100 Dollars payable to the order of itself with at rate of

4% per annum compounded quarterly on the return of this certificate properly indorsed on or after November 29th, 1912.
Not subject to Check.
(Copy) "W. S. MURROW, Cashier.

"Certificate of Deposit.
(Indorsed on back)

Without recourse
American Bank & Trust Company, Trustee,
By T. J. SIMPSON, Vice-President.

Pay any Bank, Banker or Trust Co.
or order
Hamilton National Bank
Chattanooga, Tenn.
For Collection.
C. M. Preston, Cashier.

"Pay to the order of any Bank, Banker or Trust Co.
All prior indorsements guaranteed.
November 29th, 1912.
American Bank and Trust Co.,
64-83 Rome, Georgia, 64-83
S. F. Magruder, Cashier.

"Collection No. 11673.
Pay any Bank or Banker,
or order
Heard National Bank
Jacksonville, Fla.
C. W. Dendly, Cashier."

That in said suits in the said Circuit Court in and for Hamilton County, Florida, service of process was had upon American Bank and Trust Company, (the original plaintiff herein) by publication, under the provisions of Section 1866, General Statutes of Florida (Transcript pp. 14 and 19); that

your petitioner, a resident of the State of Florida, was personally served with process.

That upon the return day fixed in the order of publication of process, American Bank and Trust Company (original plaintiff here) filed special appearances and motions to quash the service, (Transcript pp. 31 to 34) which motions were in substance confined to the one ground that the proceedings brought in the state court were actions *in personam* and that there had been no personal service on said American Bank and Trust Company. These motions having come on to be heard before the Circuit Court of Hamilton County, Florida, said court on the 3rd day of April, A. D. 1913, did deny said motions.

Thereupon, on the 10th day of April, A. D. 1913, stipulations were entered into between solicitors for the respective parties in the suits in the State courts, (Transcript p. 34), providing that all proceedings in said suits be stayed pending the prosecution of an appeal to the Supreme Court of Florida in the case of B. F. Carter vs. Rome Insurance Company, et als., which appeal was from orders of the State court denying similar motions to quash services by publication on similar grounds, and which appeal under the decisions of the Supreme Court of Florida constituted a general appearance by the appellant American Bank and Trust Company; and it was further provided in and by said stipulation (Transcript p. 35) that the ultimate decision of the said appeal in said case of B. F. Carter vs. Rome Insurance Company, et als., would be decisive of the validity of the service by publication on the defendants in those suits.

That at the June term of the Supreme Court of Florida, said Supreme Court affirmed the order of the lower court in the case of B. F. Carter vs. Rome Insurance Company et. als., (Transcript p. 75), in words and figures as follows, to-wit:

"In the Supreme Court of Florida,
June Term, A. D. 1913.

"Rome Insurance Company, a Georgia Corporation, and
Others, Appellants,
vs.
B. F. Carter, Appellee.
Hamilton County.

"Per CURIAM.

"This case cannot be distinguished from that of Rome Insurance Company, vs. J. H. Corbett, this day decided, and upon the opinion therein, the order herein appealed from is affirmed.

"All Concur."

That the decision of the Supreme Court of the State of Florida in Rome Insurance Company, et als. vs. J. H. Corbett, on the authority of which said case of Rome Insurance Company et. als. vs. B. F. Carter was decided, is in words and figures as follows: (Transcript pp. 76 and 77).

"In the Supreme Court of Florida,
June Term, A. D. 1913.

"Rome Insurance Company, a Georgia Corporation, and
Others, Appellants,
vs
J. H. Corbett, Appellee.
Hamilton County.

"CROCKELL, J:

"A bill was filed in the Circuit Court for Hamilton County against local defendants and also certain non-residents corporations seeking to impound a fund in that county arising out of an alleged fraudulent transaction consummated in that County. Constructive service, in perfect accordance with the Statute was had by publication, and the non-residents corporations appeared specially to quash the service upon the theory that the sole relief prayed was in personam, and that therefore the statute authorizing constructive service by publication does not apply. This motion having been denied these non-residents have sued out what they term a special appeal.

"It may well be that this appeal so operates as a general appearance in the Circuit Court, as to render the question before us a moot one, but the Appellee does not ask us to so hold, and it appears that this is but a test case, upon the decision of which many other cases in that Court are depending.

"The Bill confined its prayer to an adjudication of the funds sought to be impounded, and does not pray for a general personal decree against these non-residents and we are not to assume upon the face of the bill that the Circuit Court will enter an unauthorized decree; and we have not before us any such question of jurisdiction as was involved in the case of Pennoyer v. Neff, 95 U. S., 714.

"The purpose of the statute authorizing constructive service by publication is to notify non-residents of the pending suit so that they may if they care to do so, come into the case and if the statute be followed, there is no right in the non-resident to quash this notice; he has

his right if not waived to object should the Court thereafter commit an error against him.

"Our constructive service statute is broad enough to apply to any suit in equity pending in our Circuit Court and as has been said in Kilpatrick v. Post, 53 N. J. Eq., 591 text 597 32 Atl. Rep. 267, cannot be confined in its operation to the cases where the Court might make final decree or judgment. Further that Court says: 'It was not intended, that the question of the power to enter the ultimate decree or judgment should enter into the question of the right to give notice of the suit to a non-resident, or that this question of jurisdiction should be settled on a motion to discharge the order of publication. The Complainant is entitled to have the question of jurisdiction settled by a final decree.'

"We are not to be understood as holding that the Court might not quash a service by publication, if the bill upon its face showed that it was clearly a common law cause of action, and that the resort to the equity side of the Court was a subterfuge; the bill before us does not present that case.

"The Order is affirmed:

"Shackleford, C. J. and Taylor, Hocker and Whitfield, J. J. concur."

That thereafter, American Bank and Trust Company took no further part in the proceedings in the State Court (Transcript pp. 29 and 30) and on the 14th day of July A. D. 1914, final decrees were entered in the state court (Transcript pp. 13 to 24), which decrees adjudged that the certificates of deposit therein mentioned, (*being the same certi-*

ficates of deposit herein sued upon) were void and of no effect and enjoining your petitioner from paying the proceeds thereof to American Bank & Trust Company or to any one for it.

Fourth: That on the 3rd day of August, A. D. 1914, in this suit instituted in the United States District Court in and for the Southern District of Florida by American Bank and Trust Company (now The State Bank of Rome) against your petitioner, your petitioner did file pleas of *res adjudicata*, (Transcript pp. 9 to 13) setting up the decrees entered in the Circuit Court in and for Hamilton County, Florida, which decrees adjudged the certificates of deposit herein sued upon to be void and of no effect, and which enjoined your petitioner from paying the proceeds thereof to the plaintiff below or to anyone for it. Certified copies of said decrees were attached to said pleas (Transcript pp. 13 to 23).

Fifth: That on the 7th day of September, A. D. 1914 the plaintiff in the trial court, American Bank and Trust Company, (now The State Bank of Rome) filed a demurrer to said pleas, (Transcript pp. 23 to 25), which said demurrer coming on to be heard before the District Judge of said Court, was on the 12th day of January, A. D. 1915, overruled, (Transcript p. 26).

Sixth: That thereafter, on the 15th day of June, A. D. 1915, said American Bank and Trust Company (now The State Bank of Rome) filed replications to said pleas, (Transcript pp. 28 to 31) setting up in

substance by said replications that the chancery suits mentioned in your petitioner's pleas, and which are fully described in the third paragraph of this petition, were actions *in personam;* that no personal service was ever had on said American Bank and Trust Company; that it did not at any time or in any manner appear in said suits, except specially, to contest the service by publication therein made, and that it in no way waived the want of jurisdiction of the State court over its person; there were attached to said replications copies of the records in the said Chancery suits mentioned. (Transcript pp. 31 to 83).

Seventh: That on the 5th day of July, A. D. 1915, your petitioner filed a motion to strike (Transcript pp. 83 and 84) and a demurrer, (Transcript pp. 84 to 86) to said replications which said motion and demurrer coming on to be heard by the Court, the said demurrer was, on the 2nd day of February, A. D. 1917, sustained as to each of said replications. (Transcript pp. 86 and 87).

Eighth: That on the ninth day of January, A. D. 1919, the plaintiff in the trial court filed a declination to plead further (Transcript p. 89). Thereupon, on the 9th day of January, A. D. 1919, final judgment was entered in favor of your petitioner. (Transcript pp. 91 and 92).

Ninth: That from said judgment, said plaintiff sued out a writ of error to the Circuit Court of Appeals of the United States for the Fifth Circuit which Court on the 10th day of March, A. D. 1920,

reversed the judgment of the District Court, holding in effect:

(a) That the Circuit Court in and for Hamilton County, Florida, acquired no jurisdiction over the the person of the American Bank and Trust Company (now The State Bank of Rome), by the service by publication made in said suits.

(b) That said Circuit Court in and for Hamilton County, Florida, acquired no jurisdiction over the fund or *res* sought to be impounded in said chancery suits, as the same was not under the control of the Court.

(c) That the Florida Court had no jurisdiction to render the said decrees as to non-residents.

(d) That the said court did not purport to determine the personal liability of your petitioner to the plaintiff on the said certificates of deposit.

(e) That the prosecution of the appeals by American Bank and Trust Company (now The State Bank of Rome) to the Florida Supreme Court, did not amount to general appearances in the State of Florida, which holding is in conflict with the decisions of the Supreme Court of Florida.

Tenth: That a certified copy of the entire record in this cause in the Circuit Court of Appeals of the United States for the Fifth Circuit is hereby furnished, and filed herewith and reference thereto is hereby made, all in compliance with Rule 37 of this Honorable Court.

Eleventh: Your petitioner is advised and believes that the aforesaid judgment of the United

States Circuit Court of Appeals for the Fifth Circuit is erroneous, and that this Honorable Court should require the said case to be certified to it for its review and determination, in conformity with the provisions of the Act of Congress in such case made and provided, said case being made final in said United States Circuit Court of Appeals by the provisions contained in Section 128 of the United States Judicial Code.

Twelfth: Your petitioner further represents unto this Honorable Court that the aforesaid judgment of the United States Circuit Court of Appeals for the Fifth Circuit presents a conflict of State and Federal jurisdiction and in effect reverses the decisions of the Supreme Court of the State of Florida in the cases of Rome Insurance Company, et als. v. B. F. Carter (63 Sou. 834; Transcript p. 75) and Rome Insurance Company et als. v. J. H. Corbett, (63 Sou. 833; Transcript pp. 76 and 77) and denies them full faith and credit, for the following reasons:

(a) The United States Circuit Court of Appeals held that the prosecutions of the appeals in the State Court did not amount to general appearances, whereas, the Florida Supreme Court, following the established rule of practice in that State, held that the prosecution of an appeal constitutes a general appearance in the lower court.

(b) The Florida Supreme Court held that the service of publication upon American Bank and Trust Company (now The State Bank of Rome) original plaintiff in this action, was valid so as to bring its person within the jurisdiction of the court

for the relief prayed in the bills of complaint. The Circuit Court of Appeals held otherwise.

(c) The Florida Supreme Court held that the bills of complaint confined their prayers to an adjudication of a fund sought to be impounded, and that said fund was within the jurisdiction and control of the State Court.

Thirteenth: Your petitioner further represents that said judgment of the United States Circuit Court of Appeals for the Fifth Circuit is erroneous on the following grounds:

(a) The fund impounded by the decree in the State Court had its *situs* in the State of Florida, and not in the State of Georgia; because:

(aa) The money was not to be payable except "on the return of this certificate properly endorsed."

(bb) The certificate was not subject to check.

(cc) The deposit was made for a specific purpose and was not the part of a general fund.

(dd) The *situs* of a debt, for the purpose of administration, is the home of the debtor.

(b) The proceedings in the State Court, the decrees in which were set up as a defense by your petitioner in the District Court, were proceedings *in rem*, to the validity of which personal service is unnecessary.

(c) If any defects existed in the State Court's jurisdiction over American Bank and Trust Company, such defects under the rulings of the Supreme

Court of Florida were waived by the prosecution of the appeals to the Florida Supreme Court.

(d) The decrees relied upon declared the certificates of deposit herein sued upon to be void and of no effect.

Fourteenth: Your petitioner further represents that no question was raised by the plaintiff, either in the District Court or in the Circuit Court of Appeals as to the sufficiency of your petitioner's pleas of *res adjudicata*, except that the proceedings in the State court were actions *in personam* and that no personal service was had on the plaintiff, one of the defendants in those proceedings.

Fifteenth: Your petitioner further represents that the said United States Circuit Court of Appeals for the Fifth Circuit, in denying to your petitioner the benefit of the adjudication of the Supreme Court of Florida of a statute of that state, assumed a jurisdiction which not even the Supreme Court of the United States has power to assume.

WHEREFORE, your petitioner respectfully prays that a writ of certiorari may be issued out of, and under the seal of, this Court, directed to the United States Circuit Court of Appeals, in and for the Fifth Circuit, commanding the said court to certify and send to this Court, on a day certain therein to be designated, a full and complete transcript of the record and all proceedings of the said Circuit Court of Appeals in the said case entitled "The State Bank of Rome a corporation, plaintiff in error, versus The Bank of Jasper a corporation,

defendant in error, Number 3432," to the end that the said case may be reviewed and determined by this Court, as provided in and by Section 240 of the United States Judicial Code, or that your petitioner may have such other or further relief or remedy in the premises as to this Court may seem appropriate and in conformity with said provision of the Judicial Code, and that the said judgment of said Circuit Court of Appeals in said case, and every part thereof, may be reversed by this Honorable Court.

And your petitioner will ever pray, etc.

F. P. FLEMING,
Attorney and of Counsel for Petitioner.

I, F. P. Fleming, attorney and of counsel for petitioner, do hereby certify that in my opinion the foregoing petition is well founded in law and proper to be granted.

F. P. FLEMING.

In the Supreme Court of the United States

THE BANK OF JASPER, a corporation,
Petitioner,

vs.

THE STATE BANK OF ROME, a corporation,
Respondent.

BRIEF FOR PETITIONER.

The foregoing petition presents a clear case of conflict between a State Court and a United States Circuit Court of Appeals, and for that reason the writ of certiorari should be granted.

While we realize that the granting of such a writ is purely within the discretion of the Court and that such discretion is sparingly exercised, yet the fact that the decisions of a State and a Federal Court are in conflict *in the same controversy*, is considered sufficient grounds for the issuance of the writ.

Forsyth v. Hammond, 166 U. S., 506, 17 Sup. Ct. Rep. 665, 41 L. Ed. 1095.

In the case just cited it was said, referring to the power to issue writs of certiorari:

> "It is a power which will be sparingly exercised, and only when the circumstances of the case satisfy us that the importance of the ques-

> tion involved, *the necessity of avoiding conflict between two or more courts of appeal, or between courts of appeal and the courts of a state,* or some matter affecting the interests of this nation in its internal or external relations, *demands such exercise.*" (Italics ours).

In that case, as here, there existed a conflict between the decision of a Circuit Court of Appeals and the Supreme Court of a State. In that case, as here, the Circuit Court of Appeals reversed the lower court and sent the case back for further proceedings. It was argued that as the decision in the Circuit Court of Appeals was not final the petition for writ of certiorari was premature, but after referring to the conflict between the State and Federal Courts, it was said:

> "Although no final decree had been entered, it seemed to us a duty to bring the case and the question here for examination at the earliest possible moment."

The conflict in the present case is glaring. The Circuit Court of Appeals held that the appeals prosecuted in the suits in the State Court by the respondent, did not constitute general appearances. This was decided in the very face of the decision of the Florida Supreme Court in the very suit under consideration holding otherwise, and in the face of the established rule in Florida that an appeal constitutes a general appearance, notwithstanding that the appeal may have been for the sole purpose of testing the sufficiency of the service.

In its opinion, the Court of Appeals admitted the Florida rule (Transcript, page 109) but held that

in the proceedings in question, the rule did not operate because the appeals were not from *final*, but from interlocutory decrees.

But in those same proceedings, the Florida Supreme Court held that the appeals from the interlocutory decrees *did* constitute general appearances (Transcript p. 76). The only reason the Florida Court did not base its decision on that ground was because, as stated in the opinion (page 76) it was specially requested to pass on the merits so that many other cases pending in the lower court could thus be disposed of on its authority.

The conflict also appears in that the Florida Court held that the proceedings in the State Court were proceedings *in rem*, to the validity of which personal service was unnecessary, whereas the Court of Appeals held that the *same proceedings* were proceedings *in personam* to the validity of which personal service was essential.

We respectfully submit, that in deciding contrary to the holding of the Florida Supreme Court, the Circuit Court of Appeals committed error, because:

A. Federal Courts must recognize and apply rules of State Courts concerning matters of procedure.

B. In Florida, the prosecutions of appeals constitute general appearances.

C. The proceedings in the State Court were proceedings *in rem*, and personal service was unnecessary.

D. The decrees entered in the State Court constituted a complete defense to this action brought in the Federal Court.

A — FEDERAL COURTS MUST RECOGNIZE AND APPLY RULES OF STATE COURTS CONCERNING MATTERS OF PROCEDURE.

In considering the legality and effect of proceedings in State Courts, Federal Courts are not to be governed by their own rule of procedure, or by the general rule in other jurisdictions, but must apply and be governed by the rules of procedure of the State in which the proceedings were brought. It is an elementary proposition that matter of procedure is governed by the *lex fori*.

In York v. Texas, 137 U. S. 15, 34 L. Ed. 604, this principle was clearly recognized. The facts of the case, as well as the holding of the Court, appear in the following excerpt from the opinion:

> "It was conceded by the district and supreme courts that the service upon the defendant in St. Louis was a nullity, and gave the district court no jurisdiction; but it was held that, under the peculiar statutes of the State of Texas, the appearance for the purpose of pleading to the jurisdiction was a voluntary appearance, which brought the defendant into court. Plaintiff in error questions this construction of the Texas statutes, but inasmuch as the supreme court, the highest court of the State, has so construed them, such construction must be accepted here as correct, and the only question we can consider is as to the power of the State in respect thereto."

The York case has been followed and the rule approved and applied in the following decisions:

> Missouri etc. Ry. v. Goodrich, 234 U. S. 1429; 58 L. Ed. 1578.

Missouri etc. Ry. v. Goodrich, 229 U. S. 607; 57 L. Ed. 1349.

Kauffman v. Wooters, 138 U. S. 287; 34 L. Ed. 962.

McLaughlin Brothers, v. Hallowell, 228 U. S. 289; 57 L. Ed. 840.

Western Ind. Co. v. Rupp, 235 U. S. 261, 59 L. Ed. 220.

In the last cited case it was said:

> "That a state, without violence to the 'due process' clause of the 14th Amendment, may declare that one who voluntarily enters one of its courts to contest any question in an action there pending shall be deemed to have submitted himself to the jurisdiction of the court for all purposes of the action, and may attach consequences of this character even to a special appearance entered for the purpose of objecting that the trial court has not acquired jurisdiction over the person of the defendant, is settled by the decision of this court in York v. Texas, 137 U. S. 15, 34 L. Ed. 604, 11 Sup. Ct. Rep. 9: followed in Kauffman v. Wooters, 138 U. S. 285, 34 L. Ed. 962, 11 Sup. St. Rep. 298."

Elaborating on the principles underlying this rule, the opinion continues:

> "The 14th Amendment declares that no state shall 'deprive any person of life, liberty, or property without due process of law.' This prohibition has regard not to matters of form, but to substance of right. Since its adoption,

> whatever was the rule before, a non-resident party against whom a personal action is instituted in a state court without service of process upon him may, if he please, ignore the proceeding as wholly ineffective, and set up its invalidity if and when an attempt is made to take his property thereunder, or when he is sued upon it in the same or another jurisdiction. Pennoyer v. Neff 95 U. S. 714, 732, 733, 24 L. Ed. 565, 572; York v. Texas, 137 U. S. 15, 21, 34 L. Ed. 604, 605, 11 Sup. Ct. Rep. 9. But if he desires to raise the question of the validity of the proceeding in the court in which it is instituted, so as to avoid even the semblance of a judgment against him, it is within the power of the state to declare that he shall do this subject to the risk of being obliged to submit to the jurisdiction of the court to hear and determine the merits, if the objection raised to its jurisdiction over his person shall be overruled. This prevents a defendant from doing what plaintiff in error has attempted to do in the present case; that is, to secure, if possible, the benefit of a binding adjudication in its favor upon the merits, through the exercise of the court's jurisdiction, while depriving its adversary of any possibility of success by reserving an objection to the jurisdiction of the court to render any judgment against it."

The identical situation presented by the record herein existed in the case of Foster Milburn Co. v. Chinn (C. C. A. 2nd Circuit) 202 Fed. 175, where the Court said:

> "It is certainly the general rule of the federal courts that an objection once taken to the jurisdiction is not waived by the defendant's subsequently answering and taking part in the trial. Harkness v. Hyde, 98 U. S. 476, 25 L. Ed. 237. It is also true that the defendant may attack a

judgment of the court of another state for lack of jurisdiction, either appearing on the face of the record or proved by testimony. Thompson v. Whitman, 18 Wall, 457, 21 L. Ed. 897. It is, however, the law of the state of Kentucky, that though the defendant appear specially to object to the jurisdiction of the court, if he thereafter appeal to a higher court from any judgment recovered against him in the action, he ipso facto waives his objection and transforms his special into a general appearance. It is not necessary for us to determine whether the service of process upon Monroe, as managing agent, was good or bad. We are obliged under section 905, U. S. Rev. St. (U. S. Compt. St. 1901, p. 677), to give full faith and credit to the judgment; that is to say, the same faith and credit it would have 'by law or usage' in the state of Kentucky. So doing, we must treat the defendant as having appeared generally. The trial judge was right in holding that a usage established by the decision of the highest courts of Kentucky is to be given the same effect as if established by statute. In the latter case the Supreme Court has held that such a rule is binding in a suit upon a judgment in the courts of another state. York v. Texas, 137 U. S. 15, 11 Sup. Ct. 9, 34 L. Ed. 604."

B — IN FLORIDA, THE PROSECUTIONS OF APPEALS CONSTITUTE GENERAL APPEARANCES.

In determining, then, the legality of the proceedings in the State Court, the Circuit Court of Appeals erred in not giving full faith and credit to the judgment of the Florida Supreme Court, which considered that the appeal waived the objections to the service. The rule in Florida is well settled that the prosecution of an appeal constitutes a general appearance, and the Circuit Court of Appeals should have applied this rule.

The Florida rule is stated and applied in the following decisions:

Standley v. Arnow, 13 Fla. 361.

Henry v. Spitler, 67 Fla. 146, 64 So. 745.

Busard v. Hutson, 65 Fla. 479, 62 So. 483.

Barnick v. Rouse, 53 Fla. 643, 43 So. 753.

Hayman v. Neil, 53 Fla. 127, 44 So. 176.

Rumeli v. Tampa, 48 Fla. 112, 37 So. 563.

Wylly v. Sanford, L. & T. Co. 44 Fla. 818, 33 So. 453.

Schrader v. Schrader, 36 Fla. 502.

Rome Ins. Co. v. Corbett, Transcript herein p. 76.

The Circuit Court of Appeals in its decision (Transcript p. 109) stated that "The rule in Florida, differing from that which obtains in the Federal Courts, is to the effect that an appellant, though objecting to the insufficiency of service successfully, is considered in Court upon the return of the case to the lower court." On the same page of its opinion the Court of Appeals conceded that "this court will follow the rule of decision in the State Court in passing upon a judgment in that Court."

But the Circuit Court of Appeals failed to follow the State rule of decision on the ground that it was not applicable to an appeal from an interlocutory order of the Court, as distinguished from a final decree. Such a distinction is not made by the Florida Courts. It was made only by the United States Circuit Court of Appeals, which applied *its own rule of decision* instead of that of the Florida Court.

The Supreme Court of Florida indicated very plainly that the rule was applicable in the *same proceedings* considered by the Court of Appeals. And in the case of Rumeli v. Tampa, 48 Fla. 112, 37 So. 563, it appeared that the appeal was from an interlocutory appeal, the only decree mentioned in the opinion of the Court or the statement of facts being a decree pro confesso.

The Circuit Court of Appeals, having granted the correctness of the rule contended for, can not *assume* exceptions to it. The presumption is that the rule applies to all classes of appeals, unless proved otherwise.

West. Ind. Co. v. Rupp, 235 U. S. 261, 59 L. Ed. 220; 225.

Not only is there no basis for the distinction in the Florida decisions, but on the contrary, the rule is applied, as shown by the cases cited, to appeals from final decrees, or from interlocutory orders.

The reason underlying the rule is the same, regardless of the nature of the order appealed from. It is, of course, that any one who so far submits himself to the jurisdiction of the courts of a state as to avail himself of the machinery of the courts to prosecute an appeal, is "in court" and he can not claim at the same time, to be "out of court," by any fiction of special appearance, or so-called "special appeal." It is not the nature of the decree appealed from that determines the fact of appearance, but the fact of *voluntarily taking an appeal.*

Respondent claimed that the appeal in the state court was not "voluntary," but *it failed utterly to show any compulsion of any sort requiring it to resort to appellate procedure.* If it was convinced of the illegality of the service, it could have ignored the proceedings entirely as wholly ineffective, and could have set up its invalidity if and when an attempt was made to take its property thereunder.

West Ind. Co. v. Rupp, 225 U. S. 261, 59 L. Ed. 220.

Pennoyer v. Neff, 95 U. S. 732, 24 L. Ed. 522.

York v. Texas, 137 U. S. 15, 34 L. Ed. 604.

Had no appeal been taken, the question could very well have been raised in this suit in the District Court. But having appealed, *voluntarily,* in the State Court,

respondent waived its objection to the jurisdiction over its person under the undoubted Florida rule.

The reason and the justice of the rule is this: it prevents a defendant from doing what respondent has attempted to do in this case, that is, to secure, if possible, the benefit of a binding adjudication in its favor, *through the exercise of the court's jurisdiction;* and at the same time to deprive its adversary of any possibility of success by reserving an objection that the Court had no jurisdiction to render any judgment against it.

> West Ind. Co. v. Rudd 235 U. S. 261, 59 L. Ed. 220; 225.

These reasons underlying the Florida rule apply regardless of the nature of the decree appealed from, and the Court of Appeals erred in failing to apply it to the proceedings under consideration.

C — THE PROCEEDINGS IN THE STATE COURT WERE PROCEEDINGS IN REM, TO THE VALIDITY OF WHICH PERSONAL SERVICE WAS UNNECESSARY.

In the foregoing pages of this brief we have shown that under the established rule in Florida, the respondent by appealing in the proceedings in the State Court, submitted itself to the jurisdiction of the Court and in effect entered a general appearance. Therefore the respondent was properly before the State Court for the entry of even personal decrees against it.

Even aside from this consideration however, the decrees in the State Court are binding and valid, because they are decrees *in rem*, entered in proceedings *in rem*, and to the validity of which personal service of process, or jurisdiction over the person is unnecessary. All that is essential is that there be a thing, *a res*, property of the defendant, within the Court's jurisdiction.

Here again the Court of Appeals decided contrary to the Supreme Court of the State of Florida. The former held that the proceedings in the State Court were not proceedings *in rem*, because there was no *res* in the control of the State Court, (Transcript p. 108). The Florida Supreme Court held that the proceedings were *in rem*, the bill not praying for a personal decree against the non-residents, but confining its prayer to an adjudication of the funds sought to be impounded, (Transcript, p. 76).

The Circuit Court of Appeals, we contend, is in error in considering the proceedings as actions *in personam*. The decrees in the State Court merely

determined the rights of the parties to the *res* in the jurisdiction of the Court. This *res* was the *indebtedness*, or the supposed indebtedness of petitioner, on the certificates of deposit. These certificates represented a fund in the hands of the petitioner, The Bank of Jasper, a resident corporation.

The Court of Appeals considered the fund as a part of a *general* deposit, and that there was therefore no specific fund over which the Court could exercise control. An examination of the certificates of deposit (Transcript pp. 5, 6 and 7) reveals that they did represent a special fund, or deposit, because they "were not subject to check" and because they were not payable except "on the return of this certificate properly endorsed." The fact that the certificates were in the State of Georgia is immaterial. They were merely the evidence of the deposits, which were in the Jasper Bank. These deposits consisted of the proceeds of promissory notes given by the complainants in the suits in the State Court to respondent and by it endorsed to the petitioner.

But even granting for the sake of argument, that there were no specific funds that could be identified, the *res* still existed. It was the *indebtedness* of the Bank of Jasper, created by the certificate of deposit, and the only purpose of the suits and the only effect of the decrees, was to adjudicate the rights of the parties to that indebtedness.

The Circuit Court of Appeals proceeded upon the theory that there can be no action *in rem* unless there be a *res* in the form of a *tangible* thing. But a *res* may as well be intangible as tangible. It is well settled that a *debt* is a *res* and that its situs is the home of the debtor, where it may be adminis-

tered through actions *in rem*. It is only on the recognition of this principle that garnishment proceedings can be justified. The debtor, The Bank of Jasper, being in the jurisdiction of the State Court, the debt, the *res*, was also in the Court's jurisdiction.

In Bristol v Brent. 30 Utah 108, 21 Ann. Cases 1125, it is said:

> "A proceeding by which jurisdiction is sought by attaching property, whether tangible or intangible, such as a debt, is essentially a proceeding *in rem;* that is, a proceeding against a *rem* which is brought into the custody of the law and hence within the jurisdiction of the Court."

The foregoing citation is presented to show a debt is considered as a *res*, sufficient to support a proceeding *in rem*.

This same principle is illustrated by the following quotation from 12 R. C. L. 777:

> "When the jurisdiction of the Court is based on the attachment of property, such as a debt, and not on the residence of the parties proceeded against, the action is essentially a proceeding *in rem*. For example, an action in one state by a resident thereof against a resident of another state to recover an indebtedness, in which garnishment proceedings are instituted against a foreign corporation doing business in both states, the principal debtor being served by publication, is an action *in rem*, the *res* being the indebtedness due from the corporation to the defendant."

And in 5 R. C. L. at page 930, it is said:

> "The general rule of law is well settled, that for the purpose of founding administration, all simple contract debts are assets at the domicil of the debtor. *And the locality of such a debt for this purpose is not affected by a bill of exchange or promissory note having been given for it, because the bill or note does not alter the nature of the debt, but is merely evidence of it, and likewise it is held in the case of a note that the property has its situs in the place in which the maker resides and not where the note is held.*" (Italics ours.)

The above language is taken almost verbatim from the opinion of this Court in Wyman v. U. S. 109 U. S. 654, 27 L. Ed. 1068.

That a debt is a *res* is further evidenced by the following language used by the court in the case of Swedish American Bank v. Bleeker, 72 Minn. 383, 75 N. W. 740, 42 L. R. A. 283:

> "This is a proceeding *in rem*. Aultman v. Markley, 61 Minn. 404. The *res* is the indebtedness due from the garnishees to the defendant."

The Supreme Court of the United States has also held that a debt is a *res*, the situs of which is the domicil of the debtor. See C. R. I. & P. R. Co. v. Sturm, 174 U. S. 810; 43 L. Ed. 1144, where it was said:

> "The idea of locality of things which may be said to be intangible is somewhat confusing, but if it be kept up the right of the creditor and the obligation of the debtor cannot have the

same, unless debtor and creditor live in the same place. But we do not think it is necessary to resort to the idea at all or to give it important distinction. The essential service of foreign attachment laws is to reach and arrest the payment of what is due and might be paid to a non-resident to the defeat of his creditor. To do it you must go to the domicil of his debtor and can only do it under the laws and procedure in force there. This is a legal necessity, and considerations of situs are somewhat artificial. If not artificial, whatever of substance there is must be with the debtor. He and he only has something in his hands. That something is the *res*, and gives character to the action as one in the nature of a proceeding *in rem*. Mooney v. Buford & George Mfg. Co. (34 U. S. App. 581), 72 Fed. Rep. 32; Conflict of Laws, sec. 549, and notes.

"To ignore this is to give immunity to debts owed to non-resident creditors from attachment by their creditors, and to deny necessary remedies. A debt may be as valuable as tangible things. It is not capable of manual seizure, as they are, but no more than they can it be appropriated by attachment without process and the power to execute the process. A notice to the debtor must be given, and can only be given and enforced where he is. This, as we have already said, is a necessity, and it cannot be evaded by the insistence upon fictions or refinements about situs or the rights of the creditor. Of course, the debt is the property of the creditor, and because it is, the law seeks to subject it, as it does other property, to the payment of his creditors. If it can be done in any other way than by process against and jurisdiction of his debtor, that way does not occur to us."

Since, therefore, the law is settled that a debt is a *res*, the situs of which is the domicil of the debtor, if cannot be contended that in the suits in the State courts there was no *res* on which to operate. The debt was the *res*, the debt owing to the plaintiff here by this defendant, Jasper Bank, and the situs of the debt was Hamilton County, Florida the domicil of the debtor. However, as we have seen, the notes, the specific securities and assets represented by the certificates of deposit were also in the custody of the Jasper Bank and within the State court's undoubted jurisdiction.

This indebtedness the Court adjudicated and enjoined your petitioner from paying it to the respondent or any one for it.

The holding in C. R. I. & P. R. R. Co. v. Sturm, 174 U. S. 710, 43 L. Ed. 1144, was followed in New York Life Ins. Co. v. Dunlevy, 241 U. S. 521, 60 L. Ed. 1142 where it was held that a State Court could, on garnishment by an execution creditor, require the amount due a non-resident to be determined, and appropriate it to the payment of the judgment, although the non-resident creditor was not in Court.

In Rothschild v. Knight, 184 U. S. 341, 46 L. Ed. 580, 22 Sup. Ct. 393, it was held that an insolvent's assignee may seize by trustee process a debt due a non-resident defendant, which is alleged to be a fraudulent preference.

This principle was again stated in King v. Cross, 175 U. S. 399, 20 Sup. Ct. 132, 44 L. Ed. 213, which held:

> "A garnishment of a resident debtor to reach a debt due to a non-resident defendant

> *who has no property subject to the jurisdiction of the Court*, does not deprive him of property without due process of law." (Italics ours.)

In the light of the foregoing decisions there can be no question but that the Circuit Court of Appeals erred when it decided (Transcript p. 108):

> "There being no *res* in the control of the Circuit Court of Hamilton County, jurisdiction was not conferred on that court over non-resident defendants by substituted or constructive service."

There *was* a *res*, and it was in the control of the Court. The deposits, the original notes for which the certificates had been issued, were still unpaid and in the possession of The Bank of Jasper, in Florida. They in themselves constituted the *res*. But in addition, there was the *indebtedness* owing by the Jasper bank to the respondent. As the Circuit Court of Appeals said in its opinion (Transcript, p. 113), the certificate of deposit created the same liability on the maker as imported by a promissory note. It was on this indebtedness which the Circuit Court admitted existed, that the jurisdiction of the State Court was based.

The proceedings were not strictly garnishments, but they were analogous thereto. The debtor was within the control and jurisdiction of the Court. A dispute arose as to how the indebtedness should be administered. The complainants in the State Court claimed that the debt should be paid to them, instead of to respondent. This is essentially the theory of garnishment. The situs of the debt being at the

home of the debtor, as held in the cases cited *supra*, that is, in Hamilton County, Florida, the Circuit Court of that county had jurisdiction to administer the rights and claims thereto without obtaining personal service on the non-resident creditor.

The proceedings, while not strictly *in rem*, which are proceedings directly against property itself, are yet actions *in rem* in the broader and more general sense, which includes actions where no preliminary seizure is made, but the purpose of which is solely to try the right of title to property or indebtedness within the Court's jurisdiction. This class of actions is often designated as proceedings *quasi in rem*, but they partake of all the characteristics of, and are really, actions *in rem*.

Pennoyer v. Neff 95 U. S. 714, 24 L. Ed. 565.

Freeman v. Alderson, 119 U. S. 185, 30 L. Ed. 373.

1 Ruling Case Law 328.

Aside from the fact that the proceedings in the State Court were proceedings *in rem*, and jurisdiction of the person of non-resident defendants was unnecessary, there is the further consideration, already pointed out, that in the suits in question, the Court did have jurisdiction over the person of respondent, because by appealing to the Florida Supreme Court, it in effect entered a general appearance.

D — THE DECREES ENTERED IN THE STATE COURT CONSTITUTED A COMPLETE DEFENSE TO THIS ACTION BROUGHT IN THE FEDERAL COURT.

Petitioner in the trial court, in this action brought on the certificates of deposit, properly pleaded the decrees entered in the State Court declaring the certificates void. (Transcript pp. 9 to 13). The Circuit Court of Appeals, in deciding that the trial court erred in overruling respondent's demurrer to the pleas, held that the decrees constituted no defense because: (1) the State Court had no jurisdiction in entering the decrees, (Transcript pp. 107 to 111); and (2) the effect of the decrees, even if the State Court had jurisdiction, was not to declare them absolutely void, (Transcript pp. 111 to 114).

We have already shown that no question of jurisdiction of the State Court can be raised, because in the first place, the proceedings were *in rem* and personal service was not necessary; and in the second place, had jurisdiction of respondent's person been necessary, the State Court had it by reason of the fact that respondent conferred jurisdiction over its person by availing itself of the Court's jurisdiction and prosecuting an appeal.

Turning now to the final ground of the Court of Appeals decision, we see that the effect of the decrees was in fact to declare the certificates of deposit absolutely void, and they undoubtedly constituted a perfect defense to the action on the certificates.

We first wish to point out that it was not proper for the Circuit Court of Appeals to consider the ques-

tion of the *effect* of the decrees. That question was not before it. The only question before it was the *validity* of those decrees, which validity turned on the question of the State Court's jurisdiction. The effect of the decrees, if valid, was in effect *admitted* to constitute a defense, for no question on that score was raised. The only objection raised by respondent in the trial court to the sufficiency of the decrees as a defense, was the claim that the decrees were void because they were entered by a court having no jurisdiction. It was not proper for the appellate court to consider objections not raised by the parties in the trial court. Its only object was to review the questions raised and passed upon in the lower court, and not to consider the pleadings *de novo*.

The only pleadings before the Circuit Court of Appeals were petitioner's pleas of *res adjudicata* and respondent's demurrer and replication to those pleas. In none of these pleadings was it contended that the effect of the decrees, if valid, was not to bar the action. The only objection raised to the pleas by respondent's demurrer and by its replications, was that the decrees were entered in suits *in personam*, and that the State Court in those suits had no jurisdiction over the person of the respondent. This was the only question raised by the pleadings. It was the only question argued by the parties. It was the only question which should have been considered by the Court of Appeals.

It is true, that the first ground of respondent's demurrer to the pleas, (Transcript p. 24) was that the plea "sets up no defense to the cause of action alleged in said count." This general ground of demurrer under the practice in Florida, which governed

the trial court under the Conformity Act, is a nullity. It amounts merely to a repetition of the demurrer and calls nothing to the attention of the Court.

The Supreme Court of Florida, in Heathcote v. Fairbanks-Morse Co., 60 Fla. 97, 53 So. 950, held:

> "A ground of demurrer to a plea that the same 'fails to state any sufficient defense to the plaintiff's cause of action' in effect merely repeats such demurrer and avers that such plea is bad in substance, and is not a compliance with the statute requiring the substantial matters of law intended to be argued to be stated."

All the other grounds of the demurrer were directed to the jurisdiction of the State Court in entering the decree, and the replications (Transcript pp. 28 to 31) were devoted entirely to the same objection. Therefore, the effect of the decrees, if valid, was never raised in the trial court, and should not have been considered by the Circuit Court of Appeals.

The rule concerning the necessity of making objections in the trial court in order that they may be made in an appellate court is well stated in 3 Corpus Juris, 892, where it said:

> "Only objections or grounds of objection urged in the trial court will be considered on appeal. The party will not be permitted to change them or add others. The appellate court is not a forum in which to discuss new points, but merely a court of review to determine whether the rulings of the court below, *as presented*, were correct or not.." (Italics ours).

As this Court said in Robinson & Co. v. Belt, 187 U. S. 41, 47 L. Ed. 65:

"WHILE IT IS THE DUTY OF THIS COURT TO REVIEW THE ACTION OF SUBORDINATE COURTS, JUSTICE TO THOSE COURTS REQUIRES THAT THEIR ALLEGED ERRORS SHOULD BE CALLED DIRECTLY TO THEIR ATTENTION, AND THAT THEIR ACTION SHOULD NOT BE REVERSED UPON QUESTIONS WHICH THE ASTUTENESS OF COUNSEL IN THIS COURT HAS EVOLVED FROM THE RECORD. IT IS NOT THE PROVINCE OF THIS COURT TO TRY THESE CASES *DE NOVO*."

An examination of the transcript of the record in this cause reveals that question as to the sufficiency of decrees as a defense, if valid, was never raised by the parties. Except as to their legality, no objection was made to them. The only place in the record where their effect as a defense, granting their legality, was even suggested, appears in the opinion of the Circuit Court of Appeals.

Besides being improper, the action of the Court of Appeals in deciding against the effect of the decrees as defenses, was erroneous. The decrees constitute an absolute defense to this action on the certificates of deposit.

By the decrees pleaded, (Transcript pp. 13 to 23) it appears that the certificates of deposit concerned had been issued to cover and include the proceeds of certain notes executed by the complainants in the suits in the State Court. The State Court decreed:

(a) That the proceeds of the notes belonged to the complainants.

(b) That the American Bank and Trust Company

had no right, title, interest, claim, or demand of, in and to the proceeds of said notes.

(c) That the defendant Bank of Jasper (petitioner here) be directed to pay the proceeds of the note to the complainants in those suits.

(d) That the certificates of deposit, in so far as they covered the proceeds of the note were void, and of no effect.

There being no question as to the jurisdiction of the State Court to enter the decrees, suits could not be maintained on the certificates of deposit after the decrees were entered. The question of the petitioner's liability on the certificates was *res adjudicata*. It had already been compelled to pay the amounts represented thereby to persons other than the respondent, and respondent was specifically decreed to have no interest therein or right thereto.

What better defense to the action in the lower court could be conceived, than the existence of these decrees? It is a fundamental principle that matters should be litigated but once, and once a competent court has passed on questions in dispute, they must be forever at rest.

But the Circuit Court of Appeals took it upon themselves (although respondent was content with the effect of the decrees, if valid, and only asked the Court to pass upon the question of their validity) to decide that the decrees were insufficient as a defense because they merely established the fact that the non-residents had no right in the "supposed" fund in the Jasper Bank, and did not hold that the Jasper Bank was not personally liable on the certificates.

But the decrees *do* pass on the personal liability

of the Jasper Bank on the certificates of deposit. The certificates represented the proceeds of certain notes, and the Jasper Bank was enjoined from paying those proceeds — in other words the amounts of the certificates — to American Bank and Trust Company, *or to anyone for it*, (Transcript pp. 17 and 22). Is this not an adjudication that the Bank of Jasper should not be liable on the certificates to American Bank and Trust Company or its endorsees?

The decrees further adjudge that the certificates of deposit are *void and of no effect*. Is not this an adjudication that the Bank of Jasper should not be personally or otherwise liable thereon? How can one be liable on a void instrument — on something that has no existence?

But the Circuit Court of Appeals said the decrees did not declare the certificates void absolutely, but only in so far as they covered and included the proceeds derived from the notes (Transcript p. 113). *But there is nothing to show that the entire amount of the certificates did not represent the proceeds of the notes.*

It is true the decrees adjudged the certificates void only in so far as they covered and included the proceeds of the notes, but the record shows that the entire amount of the certificates consisted of the proceeds of the notes. The certificates were issued to cover such proceeds and there is absolutely no showing made that one cent of the amount represented by the certificates consisted in anything other than such proceeds.

If, as a matter of fact, only a part of the amounts represented by the certificates consisted of the proceeds of the note, and if a part of the amount con-

sisted in other deposits, *it was incumbent on the respondent to show it.* The petitioner's pleas of *res adjudicata* (Transcript pp. 9 to 13) allege that the certificates of deposit *represent and cover* the proceeds of the notes mentioned in the decrees. This allegation is not denied. The replications of respondent (Transcript pp. 28 to 32) do not say that the certificates only partially cover the proceeds of the note. They are concerned only with the jurisdiction of the Court in entering the decrees and by their silence, admit that the certificates represented the proceeds of the notes and that therefore the decrees adjudged them totally void and of no effect.

As the pleadings show that the certificates cover only the proceeds of the notes, they show, therefore, that the certificates were declared absolutely null and void. No action could therefore be maintained on them and the decrees pleaded constituted perfect defenses to the action.

CONCLUSION

We respectfully submit that the writ of certiorari applied for should be issued in this instance. The record shows a plain case of conflict between a State and a Federal Court in reference to one and the same controversy.

The Circuit Court of Appeals, we contend, erred in deciding contrary to the Supreme Court of Florida, for the following reasons:

1. The proceedings in the State Court were proceedings *in rem* and jurisdiction over the person of the non-resident defendants was not necessary.

2. The State Court had jurisdiction over the persons of the non-residents by reason of their voluntarily availing themselves of the State Court's jurisdiction to prosecute appeals therein.

3. The only question before the Circuit Court of Appeals was the one of the State Court's jurisdiction to enter the decrees pleaded.

4. The effect of the decrees was to declare the certificates of deposit absolutely void and to bar further action thereon.

Respectfully submitted,

F. P. FLEMING,
Attorney and of Counsel for
Petitioner

98743

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, [redacted] 1921

No. [redacted]77

THE BANK OF JASPER, PETITIONER,

vs.

THE STATE BANK OF ROME, GEORGIA.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

PETITION FOR CERTIORARI FILED JUNE 7, 1920.

CERTIORARI AND RETURN FILED OCTOBER 20, 1920.

(27,741)

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St. Paul, Minn.

(27,741)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1920.

No. 384.

THE BANK OF JASPER, PETITIONER,

vs.

THE STATE BANK OF ROME, GEORGIA.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

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a UNITED STATES OF AMERICA:

United States Circuit Court of Appeals, Fifth Judicial Circuit.

Pleas and Proceedings Had and Done at a Regular Term of the United States Circuit Court of Appeals for the Fifth Circuit, Begun on the Third Monday in November, A. D. 1919, at New Orleans, Louisiana, Before the Honorable Richard W. Walker, Circuit Judge, and the Honorable William I. Grubb and the Honorable George W. Jack, District Judge.

THE STATE BANK OF ROME, Plaintiff in Error,

versus

THE BANK OF JASPER, Defendant in Error.

Be it remembered, That heretofore, to-wit, on the 25th day of August, A. D. 1919, a transcript of the record in the above styled cause, pursuant to a writ of error to the District Court of the United States for the Southern District of Florida, was filed in the office of the Clerk of the said United States Circuit Court of Appeals for the Fifth Circuit, which said transcript was filed and docketed in said Circuit Court of Appeals as No. 3432, as follows, to-wit:

b TRANSCRIPT OF RECORD.

United States Circuit Court of Appeals, Fifth Circuit.

No. 3432.

THE STATE BANK OF ROME, Plaintiff in Error,

versus

THE BANK OF JASPER, Defendant in Error.

Error to the District Court of the United States for the Southern District of Florida.

[Original Record Filed August 25, 1919.]

U. S. Circuit Court of Appeals. Filed Nov. 15, 1919. Frank H. Mortimer, clerk.

1 In the District Court of the United States, Southern District of Florida.

AMERICAN BANK & TRUST COMPANY, a Corporation under the Laws of Georgia and Doing Business at Rome, Georgia, Plaintiff.

versus

THE BANK OF JASPER, a Corporation under the Laws of Florida and Doing Business at Jasper, Florida, Defendant.

To the clerk of said court:

You will please issue summons ad respondendum directed to the defendant in the above entitled cause, in an action in assumpsit, damages $8,000 and make the same returnable to the rule day in March A. D. 1913, the same being the 3rd day of said month, and oblige.

KAY & DOGGETT,
Attorneys for Plaintiff.

Indorsed: Praecipe for Summons. Filed Jan. 27, 1913. E. O. Locke, Clerk.

* * * * * * *

2 *Appearance.*

In the District Court of the United States for the Southern District of Florida.

AMERICAN BANK AND TRUST COMPANY, a Corporation under the Laws of the State of Georgia, Plaintiff.

vs.

THE BANK OF JASPER, a Corporation under the Laws of the State of Florida, Defendant.

Civil Action—Damages $8,000.00.

And now comes the defendant by its undersigned attorneys, and enters its appearance herein on this Rule Day in March, A. D. 1913.

S. S. SANDFORD,
CARTER & McCOLLUM,
Attorneys for Defendant.

Indorsed: Appearance. Filed March 3, 1913. E. A. Locke, Clerk.

Declaration.

In the District Court of the United States, Southern District of Florida.

AMERICAN BANK & TRUST COMPANY, a Corporation under the Laws of Georgia and Doing Business at Rome, Georgia, Plaintiff,

vs.

THE BANK OF JASPER, a Corporation under the Laws of Florida and Doing Business at Jasper, Florida, Defendant.

Comes now the American Bank and Trust Company, a
3 corporation organized and existing under, and by virtue of the laws of Georgia, and doing business at Rome, Georgia, plaintiff in the above entitled cause, by Kay & Doggett, its attorneys, and sues The Bank of Jasper, a corporation organized and existing under and by virtue of, the laws of Florida, and doing business at Jasper, Florida; and the plaintiff avers that the said American Bank & Trust Company is a citizen of the State of Georgia, and that the said Bank of Jasper is a citizen of the State of Florida, having its principal place of business at Jasper, Florida; and the plaintiff further avers that the matter in controversy herein exceeds, exclusive of interest and cost, the sum of $3,000.00.

For a first count, plaintiff says that the said Bank of Jasper, on, to-wit, November 29th, 1911, at to-wit, the city of Jasper, Florida, by its negotiable certificate of deposit of that date, the same being a certificate of deposit No. 321, for value received, promised the American Bank & Trust Company, Trustee, of Rome, Georgia, to pay it or its order, the sum of $1,704.00, on or after, to-wit, November 28th, 1912, with interest at the rate of 4 per cent per annum, compounded quarterly; and the said American Bank & Trust Company, Trustee, thereafterwards indorsed the said certificate of deposit to the American Bank and Trust Company, Rome, Georgia, and the said certificate of deposit, after several successive indorsements which appear thereon, and which are shown by the copy of the said certificate of deposit and attached to and hereby made a part of this declaration, the said certificate being found in the bill of particulars attached hereto, became the property of the American Bank and Trust Company, whereby, the said Bank of Jasper became liable and in consideration thereof, promised the plaintiff to pay it the contents of the said certificate of deposit, according to the tenor thereof; and the plaintiff avers that the said 28th day of November, 1912, has long since passed, yet, though since that time requested, the said request being accompanied with a return of the said certificate of deposit properly indorsed, the said Bank
4 of Jasper hath never paid the said amount, nor any part thereof, but refuses so to do.

And for a second count, plaintiff says that the said Bank of Jasper, on, to-wit, November 29th, 1911, at, to-wit, the city of Jasper,

Florida, by its negotiable certificate of deposit of that date, the same being its certificate of deposit No. 321, for value received, promised the American Bank and Trust Company, Trustee, of Rome, Georgia, to pay it or its order, the sum of $294.00, on or after, to-wit, November 29th, 1912, with interest at the rate of 4 per cent per annum, compounded quarterly; and the said American Bank and Trust Company, Trustee, thereafterwards, indorsed the said certificate of deposit and the said certificate of deposit, after several successive indorsements which appear thereon, and which are shown by copy of the said certificate of deposit attached to and hereby made a part of this declaration, the said certificate being found in the bill of particulars attached thereto, became the property of the American Bank and Trust Company, whereby, the said Bank of Jasper became liable and in consideration thereof, promised the plaintiff to pay it the contents of the said certificate of deposit according to the tenor thereof; and the plaintiff avers that the said 29th day of November 1912 has long since passed, yet, though since that time requested, said request being accompanied with a return of the said certificate of deposit properly indorsed, the said Bank of Jasper hath never paid the said amount, nor any part thereof, but refuses so to do.

And for a third count, plaintiff says that the defendant, on, to-wit, the 28th day of November, 1911, at, to-wit, the city of Jasper aforesaid, received the sum of $4,704.00 for the use of the plaintiff, and in consideration thereof, promised to pay the plaintiff on or after, to-wit, November 28th, 1912, the said sum of money so due as aforesaid, with interest at the rate of 4 per cent per annum, compounded quarterly; and the plaintiff avers that the said 28th day of November, 1912 has long since passed, yet, though since that time requested, the defendant hath never paid the sum, nor any part thereof, but refuses so to do.

And for a fourth count, plaintiff says that the defendant, on, to-wit, the 29th day of November, 1911, at, to-wit, the city of Jasper aforesaid, received the sum of $294.00 for the use of the plaintiff, and in consideration thereof, promised to pay the plaintiff on or after, to-wit, November 29th, 1912, the said sum of money so due as aforesaid, with interest at the rate of 4 per cent per annum, compounded quarterly; and the plaintiff avers that the said 29th day of November, 1912, has long since passed, yet, though since that time requested, the defendant hath never paid the said sum, nor any part thereof, but refuses so to do.

Wherefore, the plaintiff brings this, its suit, against the defendand, and claims damages in the sum of $8,000.00.

KAY & DOGGETT,
Attorneys for Plaintiff.

Bill of Particulars.

No. 320.

The Bank of Jasper.

$4,704.00

Jasper, Florida, Nov. 28, 1911.

American Bank & Trust Company, Trustee, of Rome, Ga., has deposited in this bank Forty-seven Hundred, four and No/100 Dollars, payable to the order of itself with interest at rate of 4% per annum compounded quarterly, on the return of this certifi-
6 cate properly indorsed on or after Nov. 28, 1912.
Not subject to check.

W. S. MURROW,
Cashier.

Copy.

Certificate of Deposit.

(Indorsed on Back.)

Without recourse, American Bank
& Trust Co., Trustee,
by T. J. Simpson, Vice Pres.

American Bank & Trust Co.,
Rome, Ga.
by S. F. Magruder, Cashier.

The Hamilton National Bank,
by C. H. Preston, Cashier.

Pay Atlantic National Bank
Jacksonville, Fla., or order
First National Bank, Cincinnatti, Ohio.
T. J. Davis, Cashier.
Report No. 17343.

Pay to the order of any bank or banker
coll. Nov. 15, 1912, Dept.
63–2 63–2
The Atlantic National Bank,
Jacksonville, Fla.
D. D. Upchurch, Cashier.

No. 321.

The Bank of Jasper.

$294.00
$305.94

Jasper, Fla., Nov. 29, 1911.

American Bank & Trust Company, Trustee, of Rome, Ga., has deposited in this Bank Two Hundred Ninety Four and
7 No/100 Dollars payable to the order of itself with — at rate of 4% per annum compounded quarterly on the return of this certificate properly indorsed on or after November 29th, 1912
Not subject to check.
(Copy.)

W. S. MURROW,
Cashier.

Certificate of Deposit.

(Indorsed on Back.)

Without recourse
American Bank & Trust Company, Trustee,
By T. J. Simpson, Vice-President.

Pay any Bank, Banker or Trust Co.
or order,
Hamilton National Bank,
Chattanooga, Tenn.
For Collection.
C. M. Preston, Cashier.

Pay to the order of any Bank, Banker or Trust Co.
All prior indorsements guaranteed.
November 20th, 1912.
American Bank and Trust Co.,
64-83 Rome, Georgia, 64-83
S. F. Magruder, Cashier.

Collection No. 11673.
Pay any Bank or Banker,
or order
Heard National Bank
Jacksonville, Fla.
C. W. Dendly, Cashier.

Indorsed: Declaration. Filed March 3, 1913, E. O. Locke, Clerk

8 *Stipulation of Counsel.*

In the District Court of the United States for the Southern District of the State of Florida.

AMERICAN BANK & TRUST COMPANY OF ROME, GEORGIA, Plaintiff,

vs.

THE BANK OF JASPER, FLORIDA, Defendant.

It is hereby stipulated and agreed between counsel representing the plaintiff and counsel representing the defendant in the above entitled cause, that the time for further pleading by the defendant may be and the same is hereby extended until the Rule Day in August, 1914, and an order may be entered accordingly.

Agreed to this 20th day of July, 1914.

KAY & DOGGETT,
Attorneys for Plaintiff.
CARTER & McCOLLUM,
Attorneys for Defendant.

Upon consideration of the foregoing stipulation it is hereby ordered that the time for further pleading in the above entitled cause by the defendant be, and the same is hereby extended until the Rule Day in August, 1914.

Done and ordered this 20th day of July, 1914.

R. M. CALL,
Judge.

Indorsed: Stipulation and Order of Court. Filed July 20, 1914. E. D. Dodge, Clerk.

9 *Additional Pleas of Defendant.*

In the District Court of the United States for the Southern District of Florida.

AMERICAN BANK & TRUST COMPANY OF ROME GEORGIA, Plaintiff,

vs.

THE BANK OF JASPER, FLORIDA, Defendant.

Comes now the defendant by its undersigned attorneys — for an additional plea to the First count of plaintiff's declarations says:

That the said plaintiff ought not to have and maintain its action in this behalf because prior to the commencement of this suit and on, to-wit, the 3rd day of January, 1913, one W. S. Murrow instituted this suit on the Chancery side of the Circuit Court of Hamilton County, Florida, against this defendant and the said plaintiff

herein and against the Rome Insurance Company and —— ——, and this defendant avers that said Circuit Court of Hamilton County, Florida, was and is a Court of general jurisdiction; that in and by said suit so instituted as aforesaid, it was claimed and alleged by the said complainant therein, among other things, that the certificate of deposit, in said count sued upon, was issued by this defendant to cover and include the proceeds of a certain note executed by the said complainant W. S. Murrow, and that said note was made payable to the order of the said complainant, and was procured by the false and fraudulent representations of the said Rome Insurance Company, and its Trustee, the said American Bank & Trust Company; that the proceeds of said note so procured as aforesaid, were deposited with this defendant in its banking house in Jasper, Hamilton County, Florida, and the certificate of deposit, in said count sued upon, represents and covers the proceeds of said note so procured as aforesaid, and that such deposit has at all times since the date of said certificate of deposit been and remained in the said banking house of this defendant at Jasper aforesaid, and in *and in* and by said suit the said complainant W. S. Murrow claimed and alleged that the said deposit was created by the fraud and deceit of the said Rome Insurance Company and its Trustee, the said American Bank & Trust Company, and that said certificate of deposit, in this count sued upon, was likewise procured by the fraud of the said Rome Insurance Company and its Trustee, the said American Bank & Trust Company, and the said complainant in the said Chancery suit sought to have the said fund, the proceeds of said certificate of deposit, in the defendant's banking house at Jasper aforesaid, impressed with a trust in favor of said complainant and therein and thereby prayed, among other things, that the said certificate of deposit be decreed null and of no effect and that the said funds be decreed to belong to the said complainant in said Chancery suit; that thereafter, to-wit, on the 14th day of July, 1914, and since the filing of the last pleadings herein, the Judge of the said Circuit Court of Hamilton County, Florida, duly rendered a final decree in said Chancery suit and therein and thereby adjudged and decreed, among other things, the proceeds of said complainant's note, to-wit, the sum of Two Hundred Ninety-four Dollars, covered by and included in the said certificate of deposit, in this count sued upon, and held by the plaintiff herein, to be impressed with a trust in favor of the complainant and were adjudged to belong to him, and the plaintiff herein was decreed to have no right, title, interest, claim or demand of, in and to the said proceeds or any part thereof, and this defendant was therein and thereby required and directed to pay the said proceeds over to the said complainant in said Chancery suit, and was enjoined from paying the said process to the plaintiff herein or to anyone for it; and in and by said final decree the certificate of deposit, in this count sued upon, dated the 28th day of November, 1911, in so far as it covered and included the proceeds derived from said note executed by the complainant in said Chancery suit, was decreed to be

void and of no effect; that said final decree was duly and
11 regularly entered and recorded in Circuit Court Minute Docket No. 11, page 287 of the Public Records of Hamilton County, Florida, on the 14th day of July, 1914; all of which will more fully appear reference being had to a certified copy of said final decree attached to and made a part of this plea as fully as if set out in haec verba, and marked exhibit "A."

And the defendant for an additional plea to the Second count of plaintiff's declaration says:

That the said plaintiff ought not to have and maintain its action in this behalf because prior to the commencement of this suit and on, to-wit, the 3rd, day of January, 1913, one J. R. Brown, instituted his suit on the Chancery side of the Circuit Court of Hamilton County, Florida, against this defendant and the said plaintiff herein, and against the Rome Insurance Company, and —— ——, and this defendant avers that said Circuit Court of Hamilton County, Florida, was and is a Court of general jurisdiction; that in and by said suit so instituted as aforesaid, it was claimed and alleged by the said complainant therein, among other things, that the certificate of deposit, in said count sued upon, was issued by this defendant to cover and include the proceeds of a certain note executed by the said complainant J. R. Brown, and that said note was made payable to the order of said complainant, and was procured by the false and fraudulent representations of the said Rome Insurance Company, and its Trustee, the said American Bank & Trust Company; that the proceeds of said note so procured, as aforesaid, were deposited with this defendant in its banking house in Jasper, Hamilton County, Florida, and the certificate of deposit, in said count, represents and covers the proceeds of said note so procured as aforesaid, and that such deposit has at all times since the date of the said certificate of deposit been and remains in the said banking house of this defendant at Jasper
12 aforesaid, and in and by the said suit the said complainant J. R. Brown claimed and alleged that the said deposit was created by the fraud and deceit of the said Rome Insurance Company and its Trustee, the said American Bank & Trust Company, and that said certificate of deposit, in this count sued upon, was likewise procured by the fraud of the said Rome Insurance Company and its Trustee, the said American Bank & Trust Company, and the said complainant in the said Chancery suit sought to have the said fund, the proceeds of said certificate of deposit, in the defendant's banking house at Jasper, aforesaid, impressed with a trust in favor of the said complainant and therein and thereby prayed, among other things, that the said certificate of deposit be decreed null and of no effect, and that the said funds be decreed to belong to the said complainant in said Chancery suit; that thereafter, to-wit, in the 14th day of July, 1914, and since the filing of the last pleadings herein, the Judge of said Circuit Court of Hamilton County, Florida, duly rendered a final decree in said Chancery suit and therein and thereby adjudged and

decreed, among other things, the proceeds of said complainant's note, to-wit, the sum of Two Hundred and Ninety-four Dollars, covered by and included in the said certificate of deposit, in this count sued upon, and held by the plaintiff herein, to be impressed with a trust in favor of the said complainant and were adjudged to belong to him, and the plaintiff herein was decreed to have no right, title, interest, claim or demand of, in and to the said proceeds or any part thereof, and this defendant was therein and thereby required and directed to pay the said proceeds over to the said complainant in said Chancery suit, and was enjoined from paying the said proceeds to the plaintiff herein or to anyone for it; and in and by said final decree, the certificate of deposit, in this count sued upon, dated the 29th day of November 1911, in so far as it covered and included the proceeds derived from said note executed by the complainant in said
13 Chancery suit, was decreed to be void and of no effect; that said final decree was duly and regularly entered and recorded in Circuit Court, Minute Docket No. 11, page 274, of the Public Records of Hamilton County, Florida, on the 14th day of July, 1914; all of which will more fully appear reference being had to a certified copy of said final decree attached to and made a part of this plea as fully as if set out in hec verba and marked exhibit "B."

CARTER & McCOLLUM,
S. S. SANDFORD,
Attorneys for Defendant.

STATE OF FLORIDA,
County of Duval:

Before me personally came Ira J. Carter, who being duly sworn deposes and says; that he is one of the attorneys of record for the defendant in the above entitled cause; that he has read the foregoing pleas and that said pleas are true.

IRA J. CARTER.

Sworn to and subscribed before me this 3rd day of August, 1914.

[SEAL.] J. T. CRAWLEY,
Notary Public.

Final Decree.

In Circuit Court, Third Judicial Circuit of Florida, in and for Hamilton County.

In Chancery.

W. S. MURROW, Complainant,

vs.

ROME INSURANCE COMPANY, a Corporation of Rome, Georgia; American Bank & Trust Company, a Corporation of Rome, Georgia, and The Bank of Jasper, of Jasper, Florida, a Corporation, Defendants.

This cause coming on this day for final hearing upon the motion of counsel for complainant for the entry of final decree upon
14 the amended bill of complaint taken as and for confessed by the said defendants and each of them, on, to-wit, the 2nd day of March, A. D. 1914, and the Court being advised in the premises, doth find as follows:

1. That service in the above entitled cause was had on the defendants, Rome Insurance Company, American Bank & Trust Company, by publication returnable to February 21st, A. D. 1913.

2. That said non-resident defendants made two motions to quash service on them and this Court made two orders, dated respectively the 14th day of March, and the 3rd day of April, A. D. 1913, denying said defendant's motions to quash service.

3. That it has been made to appear to me by certified copies of defendants' said motions to quash service, the orders of this Court denying the same, the appeal entered therefrom to the Supreme Court of Florida, the assignment of errors, and the mandate of said Supreme Court showing the affirmance of the orders made by this Court denying said motions to quash service in the case of B. F. Carter v. Rome Insurance Company, Exhibit "A," et al., that in the appeal in the last named case the said orders of this Court were affirmed by the said Supreme Court.

4. That on the 10th day of April, A. D. 1913, Solicitors for Complainant and Solicitors for Defendants, Rome Insurance Company, American Bank & Trust Company, the said Defendants named appearing only specially, entered into a stipulation and filed the same in this Court wherein it was stipulated that the proceedings in this cause should be stayed pending the prosecution of an appeal from the orders of the Court overruling the motions of said defendants to quash service in the case of B. F. Carter v. Rome Insurance
15 Company, et al., which said cause was then on file and being prosecuted in this Court, and wherein it was further stipulated

that the ultimate decision of the said appeal in the said case of B. F. Carter v. Rome Insurance Company, et al., should be decisive of the validity of the service by publication on the said defendants in this case.

5. That the said defendants and each of them failed to demur, plead to or answer the said amended bill of complaint on or before the Rule Day in March, A. D. 1914, and each of the said defendants made default therein.

6. That the clerk of this court entered a decree pro confesso against each and every of said defendants on the Rule Day in March, A. D. 1914, for failure of said defendants to file any demurrer, plea or answer to said amended bill of complaint, and that the entry of said decree pro confesso by the said clerk was regular and proper under the rules and *practice* of this Court, and that the matters of the bill are proper to be decreed consequent upon such decree pro confesso.

7. That on, to-wit, the 28th day of November, A. D. 1911, the said complainant executed his note, as alleged in said amended bill, payable to his order, for the sum of Three hundred and No 100 Dollars, and the defendant, American Bank & Trust Company, as trustee for the defendant, Rome Insurance Company, and the complainant by agreement with the defendant, The Bank of Jasper, deposited the said note of the complainant with the said defendant, The Bank of Jasper in its banking house in Hamilton County, Florida, and procured from the said defendant The Bank of Jasper, a certificate of Deposit No. 320 dated the 28th day of November, A. D. 1911, and in which said certificate was included the proceeds of the said note of the complainant; that the proceeds of the said note has at all times since the deposit thereof remained and
16 does still remain in the hands and custody of the said defendant The Bank of Jasper in its banking house in Hamilton County, Florida; that the said note was executed by the complainant in payment of shares to the capital stock of the defendant, Rome Insurance Company, which said shares were wholly worthless and without value, and was procured by the defendants, Rome Insurance Company, and the American Bank & Trust Company, as its trustee, by the false and fraudulent representation as set forth in the bill of complaint and the proceeds of complainant's said note was procured to be deposited, and the said certificate of deposit issued as including such proceeds as the results of such false and fraudulent representations so made as alleged in the bill by the representative of the said American Bank & Trust Company, as trustee, for the defendant Rome Insurance Company.

8. That the equities in this cause are with the complainant and he is entitled to the relief prayed and hereinafter decreed.

Therefore, upon consideration thereof, it is ordered, adjudged and decreed as follows:

(*a*) The said decree pro confesso entered against the said defendants and each of them on, to-wit, the Rule Day in March, A. D. 1914,

by the clerk of this Court, for want of demurrer, plea or answer, be and the same is hereby in all respects approved, ratified and confirmed.

(*b*) That the pretended contract of agreement made by the complainant with the said Rome Insurance Company and the American Bank & Trust Company, its trustee, providing for the sale and purchase of 10 shares of the capital stock of the said Rome Insurance Company, be and the same is hereby decreed to be wholly void, and of no effect, as having been procured by the fraud, deceit, covin and guile of the said Rome Insurance Company, and its trustee, the said American Bank & Trust Company.

17 (*c*) That the proceeds of complainant's said note, to-wit, Two hundred Ninety-four Dollars, covered by and included in said certificate of deposit No. 320 now held by the defendant, American Bank & Trust Company are hereby decreed to be impressed with a trust in favor of the complainant and the same are adjudged to belong to him; that the said American Bank & Trust Company is hereby declared and decreed to have no right, title, interest, claim or demand of, in and to the said proceeds of the complainant's said note or any part thereof, and the said defendant The Bank of Jasper be and it is hereby required and directed to pay the said proceeds over to the complainant.

(*d*) That the defendant The Bank of Jasper, be and it is hereby perpetually enjoined from paying out the proceeds of the said note executed by the complainant and dated as aforesaid, to the said American Bank & Trust Company or to anyone for it.

(*e*) That the certificate of deposit No. 320 insofar as it covers and includes the proceeds derived from the said note executed by the said complainant, and which certificate was issued by the said defendant The Bank of Jasper to the American Bank & Trust Company of Rome, Georgia, as trustee, dated the 28th day of November, A. D. 1911 and for the total sum of Forty-seven Hundred Four Dollars, be and the same is hereby void and of no effect.

(*f*) That the defendant, The Bank of Jasper, do pay the costs in this case to be taxed by the Clerk of this Court.

Done, ordered, adjudged and decreed at Chambers, at Jasper, Florida, this 14th day of July, A. D. 1914.

M. F. HORNE,
Judge.

18 Duly recorded in Circuit Court Minute Docket No. 11, page 287 this July 14th, 1914, public records of Hamilton County, Fla.

M. P. HUNTER,
Clerk.

[SEAL.] By G. S. FRINK,
D. C.

STATE OF FLORIDA,
Hamilton County:

I, M. P. Hunter, Clerk of the Circuit Court in and for said county, do hereby certify that the foregoing instrument is a true and correct copy of the Final Decree in the case of W. S. Murrow vs. Rome Insurance Company, et al., as the same appears in Circuit Court Minute Docket No. 11, on page 287.

Witness my hand and official seal this 21st day of July, 1914.

M. P. HUNTER,
Clerk.

[SEAL.] By G. S. FRINK,
D. C.

Final Decree.

In Circuit Court, Third Judicial Circuit of Florida, in and for Hamilton County.

In Chancery.

J. R. BROWN, Complainant,

vs.

ROME INSURANCE COMPANY, a Corporation of Rome, Georgia; American Bank & Trust Company, a Corporation, of Rome, Georgia, and The Bank of Jasper, of Jasper, Florida, a Corporation, Defendants.

Bill for Relief

This cause coming on this day for final hearing upon the action of counsel for complainant for the entry of final decree upon the
19 amended bill of complaint taken as and for confessed by the said defendants and each of them, on, to-wit, the 2nd day of March, A. D. 1914, and the Court being advised in the premises, doth find as follows:

1. That the service in the above entitled cause was had on the defendants, Rome Insurance Company, and American Bank & Trust Company, by publication returnable to February 21st, A. D. 1913.

2. That said non-resident defendants made two motions to quash service on them and this Court made two orders, dated respectively the 14th day of March, and the 3rd day of April, A. D. 1913, denying said defendants' motions to quash service.

3. That it has been made to appear to me by certified copies of defendants' said motions to quash service, the orders of this Court denying the same, the appeal entered therefrom to the Supreme Court of Florida, the assignment of errors, and the mandate of said Su-

preme Court showing the affirmance of the orders made by this Court denying said motions to quash service in the case of B. F. Carter et al., that in the appeal in the last named case the said orders of this Court were affirmed by the said Supreme Court.

4. That on the 10th day of April, A. D. 1913, Solicitors for Complainant and Solicitors for Defendants, Rome Insurance Company, American Bank & Trust Company, the said defendants named appearing only specially, entered into a stipulation and filed the same in this Court wherein it was stipulated that the proceedings in this cause should be stayed pending the prosecution of an appeal from the orders of the Court overruling the motions of said defendants to quash service in the case of B. F. Carter vs. Rome Insurance Company et al., which said cause was then on file and being
20 prosecuted in this Court, and wherein it was further stipulated that the ultimate decision of the said appeal in the said case of B. F. Carter vs. Rome Insurance Company et al., should be decisive of the validity of the service by publication on the said defendants in this case.

5. That the said defendants and each of them failed to demur, plead to or answer the said amended bill of complaint on or before the Rule Day in March, A. D. 1914, and each of the said defendants made default therein.

6. That the clerk of this Court entered a decree pro Confesso against each and every of said defendants on the Rule Day in March, A. D. 1914, for the failure of said defendants to file any demurrer, plea or answer to said amended bill of complaint, and that the entry of said decree pro confesso by the said clerk was regular and proper under the rules and practice of this Court; and that the matters of the bill are proper to be decreed consequent upon such decree pro confesso.

7. That on, to-wit, the 29th day of November, A. D. 1911, the said complainant executed his note, as alleged in said amended bill, payable to his order, for the sum of Three hundred & No/100 Dollars and the defendant, American Bank & Trust Company, as trustee, for the defendant, Rome Insurance Company, and the complainant by agreement with the defendant, The Bank of Jasper, deposited the said note of the complainant with the said defendant, The Bank of Jasper, in its banking house in Hamilton County, Florida, and procured from the said defendant, The Bank of Jasper, a certificate of deposit No. —, dated the 29th day of November, A. D. 1911, and in which said certificate was included the proceeds of the said note of the complainant; that the proceeds of the said note has at all times since the deposit thereof remained and does still
21 remain in the hands and custody of the said defendant, The Bank of Jasper, in its banking house in Hamilton County, Florida; that the said note was executed by the complainant in payment of shares of the capital stock of the defendant, Rome Insurance Company, which said shares were wholly worthless and

without value, and was procured by the defendants, Rome Insurance Company, and the American Bank & Trust Company, as its trustee, by the false and fraudulent representations as set forth in the bill of complaint and the proceeds of complainant's said note was procured to be deposited, and the said certificate of deposit issued as including such proceeds as the result of such false and fraudulent representations so made as alleged in the bill by the representative of the said American Bank & Trust Company, as trustee, for the defendant, Rome Insurance Company.

8. That the equities in this cause are with the complainant and he is entitled to the relief prayed and hereinafter decreed.

Therefore, upon consideration thereof, it is ordered, adjudged and decreed as follows:

(*a*) The said decree pro confesso entered against the said defendants and each of them, on to-wit, the Rule Day in March, A. D. 1914, by the clerk of this Court, for want of demurrer, plea or answer, be and the same is hereby in all respects approved, ratified and confirmed.

(*b*) That the pretended contract of agreement made by the complainant with the said Rome Insurance Company and the American Bank & Trust Company, its trustee, providing for the sale and purchase of 10 shares of the capital stock of the said Rome Insurance Company, be and the same is hereby decreed to be wholly void and of no effect as having been procured by the fraud, deceit, covin and guile of the said Rome Insurance Company and its trustee, the said American Bank & Trust Company.

22 (*c*) That the proceeds of complainant's said note, to-wit, the sum of Two hundred Ninety-four Dollars, covered by and included in said certificate of deposit No. — now held by the defendant, American Bank & Trust Company, are hereby decreed to be impressed with a trust in favor of the complainant and the same are adjudged to belong to him; that the said American Bank & Trust Company is hereby declared and decreed to have no right, title, interest, claim or demand of, in and to the said proceeds of the complainant's said note, or any part thereof, and the said defendant, The Bank of Jasper, be and it is hereby required and directed to pay the said proceeds over to the complainant.

(*d*) That the defendant, The Bank of Jasper, be and it is hereby perpetually enjoined from paying out the proceeds of the said note executed by the complainant and dated as aforesaid, to the said American Bank & Trust Company, or to any one for it.

(*e*) That the certificate of deposit No. — in so far as it covers and includes the proceeds derived from the said note executed by the said complainant, and which certificate was issued by the said defendant, The Bank of Jasper to the American Bank & Trust Company of Rome, Georgia, as trustee, dated the 29th day of November,

A. D. 1911, and for the sum of Two hundred Ninety-four Dollars be and the same is hereby decreed void and of no effect.

(*f*) That the defendant, The Bank of Jasper, do pay the costs in this case to be taxed by the Clerk of this Court.

Done, ordered, adjudged and decreed at Chambers, at Jasper, Florida, this 14th day of July, A. D. 1914.

M. F. HORNE,
Judge.

23 Duly recorded in Circuit Court Minute Docket No. 11, page 274, this July 14th, 1914, public records of Hamilton County, Fla.

[SEAL.] M. P. HUNTER,
Clerk.
By G. S. FRINK,
D. C.

STATE OF FLORIDA,
Hamilton County:

I, M. P. Hunter, Clerk of the Circuit Court in and for said county, do hereby certify that the foregoing instrument is a true and correct copy of the Final Decree in the case of J. R. Brown vs. Rome Insurance Company, et al., as the same appears on record in Circuit Court Minute Docket No. 11, page 274.

Witness my hand and official seal, this 21st day of July, 1914.

[SEAL.] M. P. HUNTER,
Clerk.
By G. S. FRINK,
D. C.

Demurrer to Additional Pleas.

In the District Court of the United States in and for the Southern District of Fla.

AMERICAN BANK & TRUST COMPANY, a Corporation,

vs.

THE BANK OF JASPER, a Corporation.

Comes now the plaintiff in the above entitled cause, by Kay & Doggett, its attorneys, and demurs severally to the additional pleas filed by the defendant herein on August 3rd, 1914, to the first and second counts of plaintiff's declaration because each of said pleas are severally bad in substance, and for substantial matters of law to be argued severally as to each of said pleas, the plaintiff assigns the following:

24 1. Said plea sets up no defense to the cause of action alleged in said court.

2. It appears by said plea that said Circuit Court of Hamilton County, Florida, never, at any time during the progress of said alleged chancery suit, had or obtained jurisdiction over the plaintiff herein.

3. Said chancery suit was an action in personam, in which constructive service upon a resident of a State other than that in which the suit was brought was ineffectual to give the Court jurisdiction over a person so served.

4. Said plea does not allege or show that personal service in said chancery suit was ever at any time had upon the plaintiff herein, or that said plaintiff herein ever at any time made any sort of a general appearance in said cause.

5. Said plea affirmatively shows that in said chancery suit no personal service was had upon the plaintiff herein and that the plaintiff herein at no time during the progress of said chancery suit entered any sort of a general appearance in said chancery suit.

6. Said plea does not allege or show that the plaintiff herein ever at any time waived, in any manner, shape or form, want of jurisdiction of said Court in said chancery suit over the plaintiff herein.

7. Jurisdiction could not be assumed or exercised by the Court in said chancery suit merely because the subject matter of the suit was within the power of the Court.

8. No decrees entered in said chancery suit could bind anyone not personally served with process, or who did not appear.

25 9. No decree entered in said chancery suit could effect the rights of the plaintiff herein arising out of the certificate of deposit set up in said count.

KAY & DOGGETT,
Attorneys for Plaintiff.

I hereby certify that in my opinion the foregoing demurrer is well founded in point of law.

JOHN L. DOGGETT,
Attorney for Plaintiff.

STATE OF FLORIDA,
County of Duval, ss:

Personally appeared before me, a Notary Public in and for the State of Florida at large, one Henry C. Clark, who being by me first duly sworn, deposes and says that he is of Counsel for Plaintiff in the foregoing cause, and duly authorized to make this affidavit, and that the foregoing demurrer is not interposed for the purpose of delay.

HENRY C. CLARK.

Sworn to and subscribed before me this the 5th day of September, A. D. 1914.

[SEAL.]

S. P. OWEN, JR.,
Notary Public.

Commission expires Feby. 17, 1917.

Indorsement: Demurrer to additional pleas. Filed Sept. 7, 1914. E. D. Dodge, Clerk.

26 In District Court of United States, Southern District of Florida.

AMERICAN BANK & TRUST CO.

vs.

THE BANK OF JASPER, FLA.

Comes now the defendant by its undersigned attorneys and joins in the demurrer of the plaintiff to the plea filed August 3rd, 1914, to the first and second counts of plaintiff's declaration.

CARTER & McCOLLUM,
S. S. SANDFORD,
Attorneys for Defendant.

Order of Court.

In the District Court of the United States in and for the Southern District of Florida.

AMERICAN BANK AND TRUST COMPANY

vs.

THE BANK OF JASPER.

This cause coming on to be heard upon the undisposed of demurrers herein, and the same having been submitted, and the Court being advised in the premises upon consideration thereof it is hereby ordered and adjudged:

1st. That the plaintiff's demurrers to the defendant's additional pleas filed August 3rd, 1914, to the first and second counts of plaintiff's declaration be and each of them are hereby overruled.

2nd. That the defendant's demurrers to the plaintiff's additional and fourth replication to the defendant's seventh pleas to the
27 first and second counts of plaintiff's declaration, and the defendant's demurrers to the plaintiff's additional and fifth replications to the defendant's tenth pleas to the first and second counts of plaintiff's declaration be and each of them are hereby overruled.

3rd. That the defendant's demurrers to plaintiff's third, fourth and fifth replications to defendant's ninth pleas to the first and second counts of Plaintiff's declaration be and each of them are hereby overruled.

Done and ordered this 12th day of January, A. D. 1915.

RHYDON M. CALL,
Judge.

Indorsed: Order of Court. Filed Jan. 12, 1915. E. D. Dodge, Clerk.

Motion.

In the District Court of the United States in and for the Southern District of Florida.

AMERICAN BANK AND TRUST COMPANY OF ROME, GEORGIA,

vs.

THE BANK OF JASPER, FLORIDA.

Comes now the Plaintiff in the above entitled cause by Kay & Doggett, its attorneys, and moves the Court for leave to file in said cause Replications to Defendant's Additional Pleas heretofore filed in said cause.

KAY & DOGGETT,
Attorneys for Plaintiff.

We hereby consent to the above motion, saving unto ourselves any and all exceptions or objections to the substance of said Replications.

CARTER & McCOLLUM,
Attorneys for Defendant

28 The above motion coming on to be heard and having been submitted, upon consideration thereof it is hereby ordered and adjudged that said motion be, and the same is hereby granted, and defendant is given until Rule Day in July, A. D. 1915, to plead thereto as advised.

Done and ordered this 15th day of June, A. D. 1915.

RHYDON M. CALL,
Judge.

Indorsed: Order of Court: Filed June 15, 1915. W. L. Devore, Clerk.

Replications to Additional Pleas of Defendant.

In the District Court of the United States in and for the Southern District of Florida.

AMERICAN BANK AND TRUST COMPANY OF ROME, GEORGIA,

vs.

THE BANK OF JASPER, FLORIDA.

Comes now the plaintiff in the above entitled cause, by Kay & Doggett, its attorneys, and for replication to defendant's additional plea to the first count of plaintiff's declaration, says:

That said Chancery suit in said plea mentioned was an action in personam; that no personal service in said Chancery suit was ever at any time had upon the plaintiff herein; that the plaintiff herein did not at any time or in any way make any sort of a general appearance in said Chancery suit; that the plaintiff herein did not at any time waive, in any manner, shape or form, want of jurisdiction of the Court in said Chancery suit over the plaintiff herein, that the plaintiff herein in no way appeared in said Chancery suit except only specially, solely and only to contest the pretended service
29 by publication attempted to be made in said Chancery suit upon the plaintiff herein; that a copy of the first of said motions to quash service which were filed by the plaintiff herein in said Chancery suit is hereto attached and marked "Exhibit A" and hereby made a part hereof; that upon Complainant in said Chancery suit amending his Bill of Complaint therein, the plaintiff herein filed in said Chancery suit said second motion to quash service, copy of which said second motion to quash service is attached hereto, marked "Exhibit B" and hereby made a part hereof; that upon the denial of said motions to quash service, the parties named in said Chancery suit, through their respective counsel, entered into said stipulation mentioned in said final decree, an unsigned copy of which stipulation is hereto attached, marked "Exhibit C" and hereby made a part hereof; that a copy of the complete transcript of record in said Chancery suit of B. F. Carter vs. Rome Insurance Company, et al., as the same was filed in the Supreme Court of the State of Florida, is hereto attached, marked "Exhibit D" and hereby made a part hereof; that a copy of the opinion of the Supreme Court of Florida in said Chancery suit of B. F. Carter vs. Rome Insurance Company, et al., is hereto attached, marked "Exhibit E" and hereby made a part hereof; that a copy of the opinion of the Supreme Court of Florida in said Chancery suit of J. H. Corbett vs. Rome Insurance Company, et al., is hereto attached marked "Exhibit F;" that a copy of the mandate of the Supreme Court of Florida in said Chancery suit of B. F. Carter, vs. Rome Insurance Company, et al., is hereto attached, marked "Exhibit G" and hereby made a part hereof; that after said opinions of said Supreme Court of Florida were an-

nounced, the plaintiff herein took no further part whatsoever in said Chancery suit of W. S. Murrow vs. Rome Insurance Company, et al., nor in said chancery suit of B. F. Carter vs. Rome Insurance Company, et al., wherefore this plaintiff says that no decree entered in said Chancery suit of W. S. Murrow vs. Rome Insurance Company, et al., could affect or take away any of the rights of the plaintiff herein, arising out of the certificate of deposit herein sued upon.

And for replication to defendant's additional plea to the second count of plaintiff's declaration, plaintiff says:

That said Chancery suit in said plea mentioned was an action in personam; that no personal service in said Chancery suit was ever at any time had upon the plaintiff herein; that the plaintiff herein did not at any time or in any way make any sort of a general appearance in said Chancery suit; that the plaintiff herein did not at any time waive, in any manner, shape or form, want of jurisdiction of the Court in said Chancery suit over the plaintiff herein; that the plaintiff herein in no way appeared in said Chancery suit except only specially, solely and only to contest the pretended service by publication attempted to be made in said Chancery suit upon the plaintiff herein; that a copy of the first of said motions to quash service which were filed by the plaintiff herein in said Chancery suit is hereto attached and marked "Exhibit H" and hereby made a part hereof; that upon Complainant in said Chancery suit amending his bill of complaint therein, the plaintiff herein filed in said Chancery suit said second motion to quash service, copy of which said second motion to quash service is attached hereto, marked "Exhibit J" and hereby made a part hereof; that upon the denial of said motions to quash service, the parties named in said Chancery suit through their respective counsel, entered into said stipulation mentioned in said final decree, an unsigned copy of which stipulation is hereto attached marked "Exhibit K" and made a part hereof; that a copy of the complete transcript of record in said Chancery suit of B. F. Carter vs. Rome Insurance Company, et al., as the same was filed in the Supreme Court of Florida, is hereto attached, marked "Exhibit D" and hereby made a part hereof; that a copy of the opinion of the Supreme Court of Florida in said Chancery suit of B. F.
31 Carter vs. Rome Insurance Company, et al., is hereto attached, marked "Exhibit E" and hereby made a part hereof; that a copy of the opinion of the Supreme Court of Florida in said Chancery suit of J. H. Corbett vs. Rome Insurance Company, et al., is hereto attached, marked "Exhibit F;" that a copy of the mandate of the Supreme Court of Florida in said Chancery suit of B. F. Carter vs. Rome Insurance Company, et al., is hereto attached, marked "Exhibit G" and hereby made a part hereof; that after said opinions of said Supreme Court of Florida were announced, the plaintiff herein took no further part whatsoever in said Chancery suit of J. R. Brown vs. Rome Insurance Company, et al., nor in said Chancery suit of B. F. Carter vs. Rome Insurance Company,

et al., wherefore this plaintiff says that no decree entered in said chancery suit of J. R. Brown vs. Rome Insurance Company, et al., could affect or take away any of the rights of the plaintiff herein, arising out of the certificate of deposit herein sued upon.

KAY & DOGGETT,
Attorneys for Plaintiff.

Special Appearance to Quash Pretended Service by Publication on Rome Insurance Company, American Bank & Trust Company.

In the Circuit Court of Florida, Third Judicial Circuit, in and for Hamilton County, Florida.

In Chancery.

W. S. MURROW, Complainant.

vs.

ROME INSURANCE CO., et al., Defendants.

Come now defendants, Rome Insurance Company; American Bank & Trust Company, Trustee, by Kay & Dogget, their solicitors and counsel, and not appearing generally, but appearing specially, solely and only, and limiting this appearance to what, in contemplation of law, amounts only and solely to a special appearance for the purpose of quashing the attempted and pretended service herein, to that end do hereby move to quash said service upon the following grounds, to-wit:

1st. Because, on account of the attempted and pretended service by publication, the Court does not acquire jurisdiction of said defendants.

2nd. Because said service is defective and not such as is required by law, in that the defendants are foreign corporations, not resident in Florida, and have not received personal service of process herein in the State of Florida, and to vacate and hold said pretended and attempted service by publication upon these defendants to be for naught; and these defendants pray the judgment of this Honorable Court whether they will be compelled to appear herein, or answer hereto, because of the many defects in said pretended service, by reason of which no legal service has been had upon the said defendants, nor have said defendants accepted service herein, nor have they voluntarily appeared herein, nor have they waived due service of process upon them.

KEY & DOGGETT,
Attorneys and Solicitors,
Appearing Specially, Soley, and Only for the Purpose of this Motion and Limiting the Same to said Purpose.

"Exhibit A."

33 *Special Appearance to Quash Pretended Service by Publication on Rome Insurance Company, American Bank & Trust Company.*

In the Circuit Court of Florida, Third Judicial Circuit, in and for Hamilton County, Florida.

In Chancery.

W. S. MURROW, Complainant,

vs.

ROME INSURANCE COMPANY et al., Defendants.

Come now defendants, Rome Insurance Company; American Bank & Trust Company, Trustee, by Kay & Doggett, their solicitors and counsel, and not appearing generally, but appearing specially, solely and only, and limiting this appearance to what, in contemplation of law, *amongst* only and solely to a special appearance for the purpose of quashing the attempted and pretended service herein, to that — do hereby move to quash said service and to vacate and hold said pretended and attempted service by publication upon these defendants to be for naught, upon the following grounds, to-wit:

1st. Because, on account of the attempted and pretended service by publication, the Court does not acquire jurisdiction of said defendants.

2nd. Because said service is defective and not such as is required by law, in that the defendants are foreign corporations not resident in Florida, and have not received personal service of process herein in the State of Florida.

3rd. Because this is an action in personam, and said defendants have not received personal service of process herein in the State of Florida.

34 4th. Because as appears upon the face of the record in this cause, legal service of process has not been had upon the said defendants.

And these defendants pray the judgment of this Honorable Court whether they will be compelled to appear herein, or answer hereto, because of the many defects in said pretended service, by reason of which no legal service has been had upon the said defendants nor have said defendants accepted service herein, nor have they voluntarily appeared herein, nor have they waived due service of process upon them.

KAY & DOGGETT,
Attorneys and Solicitors.

Appearing Specially, Solely, and Only for the Purpose of this Motion and Limiting the Same to said Purposes.

"Exhibit B."

Stipulation of Counsel.

In the Circuit Court, Third Judicial Circuit, in and for Hamilton County, Florida.

W. S. MURROW

vs.

ROME INSURANCE COMPANY et al.

It is hereby stipulated and agreed by and between S. S. Sanford and Carter & McCollum, Solicitors for the complainant herein and Kay & Doggett, who have not appeared generally, but who have appeared only specially as solicitors for the defendants herein, Rome Insurance Company, American Bank & Trust Company and First National Bank of Rome, Georgia, and who are making this agreement specially, solely for the purposes herein expressed:

That proceed-s in this cause be stayed pending the prosecution of an appeal from the orders of the Court overruling the motions of the said defendants to quash service in the case of B. F. Carter vs. Rome Insurance Company, et al., which said cause is now on file and being prosecuted in this Court:

That the ultimate decision of the said appeal in the said case of B. F. Carter vs. Rome Insurance Company, shall be decisive of the validity of the service by publication on the said defendants in this case, and if the service in the said Carter case be ultimately held defective, and ordered quashed, then the service in this case, the validity of which involves identically the same legal questions as that in the Carter case, shall be held defective, and shall be quashed; and

That this stipulation of counsel shall not be considered as constituting a general appearance of the said defendants in this cause:

This agreement being signed and entered into this 10th day of April, A. D. 1913.

____ ____,
____ ____,
Solicitors for Complainants.

____ ____,
Solicitors for Defendants Rome Insurance Co., American Bank & Trust Co., and 1st National Bank of Rome, Ga., Who Have Appeared Only Specially in the said Cause.

"Exhibit C."

36 TRANSCRIPT OF RECORD OF PROCEEDINGS IN THE CIRCUIT COURT OF HAMILTON COUNTY, FLORIDA, IN THE SUIT OF B. F. CARTER, COMPLAINANT, VS. ROME INSURANCE COMPANY ET AL., DEFENDANTS, THEREIN LATELY PENDING.

* * * * * * *

On the 3rd day of January, 1913, the Complainant filed his original bill, in words and figures following:

Bill of Complaint.

In the Circuit Court of the Third Judicial Circuit of Florida in and for Hamilton County.

In Chancery.

B. F. CARTER, Complainant.

vs.

ROME INSURANCE COMPANY et al., Defendants.

Bill for Relief.

To Hon. Mallory F. Horne, Judge of the Circuit Court of the Third Judicial Circuit of Florida in and for Hamilton County, in Chancery sitting:

Your orator, B. F. Carter, a citizen and resident of Hamilton County, Florida, by his undersigned solicitors, brings this his bill of complaint against Rome Insurance Company, a corporation organized under the laws of Georgia, of Rome, in Floyd County, Georgia, American Bank & Trust Company, a corporation organized under the laws of Georgia, of Rome, in said Floyd County, Georgia, First National Bank of Rome, a corporation organized under the laws of United States, of Rome, in said Floyd County, Georgia, Bank of Jasper, a corporation organized under the laws of Florida, of
37 Jasper, in Hamilton County, Florida, defendants, and thereupon your orator would respectfully show unto your Honor, as follows:

1. That on, to-wit, about the 25 day of Nov., 1911, the defendant, Rome Insurance Company was a foreign corporation organized and existing under and by virtue of the laws of the State of Georgia, with its principal place of business at the City of Rome, in said State, and was then and there engaged in the Insurance business, and the defendant, American Bank & Trust Company, was on the date aforesaid, likewise a corporation organized and existing under and by virtue of the laws of the State of Georgia, with its place of business at Rome, in said State of Georgia, and was engaged in the banking

business and acting as trustee for those persons and corporations desiring its services as trustee.

2. That on, to-wit, about the 25 day of Nov., 1911, the said defendant, Rome Insurance Company, was desirous of offering for sale and selling shares of the capital stock, and in order to effectuate its desires and purpose in that respect, it caused to be named as its trustee for such purpose, its co-defendant, the said American Bank and Trust Company, of Rome, Georgia, and authorized the said Trustee to offer for sale and sell to persons desiring the same, shares of the capital stock of the said Rome Insurance Company and which said shares were to be fully paid and non-accessible and of the par value of Ten Dollars ($10.00) per share, but to be sold by the said trustee at the sum of Thirty Dollars ($30.00) per share or on the ratio of Three Dollars ($3.00) to be paid for each one dollar ($1.00) par value of stock; and the said Rome Insurance Co., and the American Bank & Trust Company, in order to effectuate the sale of the capital stock of the Rome Insurance Company, sent their agent or representative into Hamilton County, Florida, where your orator resided and still resides, and there solicited your orator to purchase
38 through the said trustee, certificates of shares in the capital stock of the said Rome Insurance Company.

3. And your orator further alleges that the said Rome Insurance Company and the American Bank & Trust Company, of Rome, Georgia, by and through their said agent or representative then and there to-wit, about the 25 day of November, 1911, and in Hamilton County, Florida, approached your orator and opened up negotiations with him for the purpose of inducing your orator to purchase shares of said capital stock of the Rome Insurance Company, and then and there falsely and fraudulently and with the intent and purpose to deceive and defraud your orator, represented to your orator that the shares of the capital stock in the said Rome Insurance Company so offered for sale by the said Rome Insurance Company and the American Bank and Trust Company, as Trustee, was of great value, to-wit; of the value of Three dollars ($3.00) for each one dollar ($1.00) of said capital stock; that your orator was then and there wholly ignorant and uninformed as to the value of said stock, of which ignorance and lack of information the said Rome Insurance Company and American Bank and Trust Company, trustee, knew, or ought to have known, and your orator was wholly dependent upon said Insurance Company and its trustee for information with respect to said capital stock, and he believed and relied upon the statements and representations so made to him as aforesaid, with respect to the value of said stock, that the said Insurance Company and its said trustee, further falsely and fraudulently and with the intention and purpose to deceive and defraud your orator, then and there represented to him that the said Rome Insurance Company was a solvent corporation and possessed of assets in value far in excess of its liabilities, and your orator relied upon and placed confidence in said false representations; and your orator charges that all of said repre-

sentations aforesaid, so made to him by the said Insurance Company and its trustee, were then and there wholly false and untrue,
39 and the said Insurance Company and its said trustee well knew the same to be false and untrue, and intended by said false and fraudulent representations to deceive and defraud your orator, and did deceive and defraud him, and by means thereof your orator was induced to purchase and agree to pay for and did purchase and agree to pay for, in reliance upon such false and fraudulent representations 10 shares of the capital stock of said Rome Insurance Company, on the basis of Three Dollars ($3.00) to be paid for each One Dollar ($1.00) face value of said capital stock, and amounting in the aggregate to the sum of 300 dollars so agreed to be paid for by your orator for such capital stock. And your orator further alleges that certificates of shares in capital stock of the said Rome Insurance Company were issued to your orator and your orator alleges that said capital stock so sold to him was then and there wholly without value and was not then and there worth Three Dollars ($3.00) or any other sum, for each One Dollar ($1.00) of the face value thereof, and the said Rome Insurance Company, was at that time hopelessly involved and embar-assed financially and was then wholly insolvent, although your orator was not at that time aware of the worthlessness of the capital stock of the Rome Insurance Company, or aware of its insolvency; that both the said Rome Insurance Company and its said trustee, then knew or ought to have known that the capital stock of said Insurance Company was worthless, and the said Company practically insolvent.

4. And your Orator further alleges that by an agreement entered into between your orator and American Bank and Trust Company as trustee, for the said Rome Insurance Company, and its co-defendant, the said Bank of Jasper, *is* [it] was then and there to-wit: about the 25 day of November, 1911, and in Hamilton County, Florida, agreed that your orator as consideration to be paid for said shares of the capital stock of the Rome Insurance Company should execute a note payable to orator's order, for the sum of $300 dollars,
40 and deposit the same in the said Bank of Jasper, which said Bank was to discount said note and issue a certificate of deposit for the proceeds thereof, and said certificate of deposit to be turned over to the American Bank and Trust Company, of Rome, Georgia, as such trustee, and payable at future date; that in pursuance of the said tri-partite agreement, your orator executed said note and the American Bank & Trust Company procured a certificate of deposit to be issued for the proceeds thereof, and which proceeds were included in certificate No. 319 of said bank, dated at Jasper, Florida, on the 25 day of November, 1911, and wherein it was certified by W. S. Murrow, as Cashier of the said Bank of Jasper, that said American Bank and Trust Company of Rome, as trustee, had deposited in said bank $1,558.20 payable to the order of itself on return of said certificates properly indorsed, with interest at four per cent per annum, compounded quarterly, and said certificate payable on or after November 25, 1912; that said certificate was delivered

by said Bank of Jasper, to the agent of Rome Insurance Company and American Bank & Trust Company. Your orator further alleges that the negotiations and agreement made with him for the purchase of said shares in the capital stock *in* the Rome Insurance Company, and the method by which the same should be paid for, including the execution of said note by your orator and the issuance of a certificate of deposit by the said Bank of Jasper, were all discussed and agreed upon by your orator, American Bank and Trust Company, as trustee, as aforesaid, and the said Bank of Jasper, Florida, in advance of and at the time of said purchase and the same were contemporaneous and formed but one act and agreement.

5. And your orator would further allege that the note executed by him and referred to in the preceding paragraph is now in the hands of the said Bank of Jasper, Florida, and the certificate of deposit is in the hands of said defendant, First National Bank
41 of Rome, by virtue of a pretended assignment or transfer thereof claimed to have been made by said American Bank & Trust Company, yet the said note is outstanding in the hands of the said Bank of Jasper, and the Bank has refused to deliver up the same to your orator for cancellation; that by reason of the false and fraudulent representations so made to your orator by the Rome Insurance Company, and The American Bank & Trust Company, Trustee, through their agent and representative, mention whereof is made in the third paragraph of this bill, the purchase of said shares of stock in the said Rome Insurance Co., by your orator and the agreement therefore, is and ought to be decreed of no force and effect, as having been procured by defraud, deceit, covin and guile of the said Insurance Company, and its Trustee, American Bank & Trust Company, and the note of your orator now held by the said Bank of Jasper, is and ought to be decreed to be wholly void, and of no effect, and the same should be delivered up to your orator.

6. And your orator would further allege that the pretended contract for the sale and purchase of said shares of stock in the said Rome Insurance Company, with your orator, made by or on behalf of the said Rome Insurance Company, and the said American Bank & Trust Company, is and ought to be decreed to be void because your orator alleges the truth to be that the said Rome Insurance Company and the said American Bank & Trust Company were and each of them was at the time of making the aforesaid contract with your orator and the execution of said note and the certificate of deposit, a foreign corporation and organized by and under the laws of the State of Georgia, and by virtue of Section One (1) of Chapter 5717 of the laws of Florida, neither of said corporations were authorized to transact business or to acquire, hold or dispose of property in the State of Florida until it shall have filed in the office of the Secretary of State, a duly authenticated copy of its charter or articles of incorporation, and shall have received from said Secretary
42 of State a permit to transact business in Florida; and your orator alleges that at the time of the making of the pretended contract of sale and purchase of shares of the capital stock of the

said Rome Insurance Company by your orator, as hereinbefore alleged, and at the time of the execution of said note and the issuance of said certificate of deposit, neither the said Rome Insurance Company or the said American Bank & Trust Company, had filed in the office of the Secretary of State a duly authenticated copy of its charter or articles of incorporation nor had they or either of them received from the Secretary of State a permit to transact business in this State.

7. And your orator further alleges that he is ready, willing and able and hereby offers to surrender to the said Rome Insurance Company, or its Trustee, the American Bank & Trust Company, the certificate of the shares of stock issued to him and stands ready and offers to comply with such order and decree of your Honor with the respect to the surrender of said certificates as may be entered in this suit.

Inasmuch as your orator is without adequate remedy except in equity, he prays as follows:

(*a*) That your Honor take jurisdiction of the parties and subject matter of this bill, and grant to your orator the relief hereinafter prayed.

(*b*) That the certificate of deposit, insofar as the same covers and includes the proceeds derived from the note executed by your orator as hereinbefore alleged, and which certificate was issued by the Bank of Jasper, Florida, to the American Bank & Trust Company of Rome, Georgia, as Trustee, dated 25 day of November, 1911, and for the total sum of $1,558.20 dollars, to be decreed to be void and

43 (*c*) That the note ex-cuted by your orator payable to his order for the sum of 300 dollars, dated 25 day of November, 1911, and delivered to the Bank of Jasper, Florida, be decreed to be void and of no effect and the said bank be required to cancel and surrender same to your orator.

(*d*) That the pretended contract of assignment made by your orator with the said Rome Insurance Company and the American Bank and Trust Company, as Trustee, providing for the sale and purchase of ten shares of the capital stock of the said Rome Insurance Company be decreed to be wholly void and of no effect.

(*e*) That the American Bank and Trust Company, Trustee as aforesaid, and the Rome Insurance Company, and each of them, be enjoined and restrained by order of this Court from instituting any suit against your orator on account of the said pretended contract of sale, and purchase of shares of stock in the Rome Insurance Company.

(*f*) That the Bank of Jasper, Florida, be restrained by order of this Court from instituting any suit or action to recover on account of the said note executed by your orator, dated 25 day of November, 1911, and now held by the said Bank of Jasper, Florida.

(*g*) That the said injunction hereinbefore prayed for be made preliminarily and temporary until the further order of the Court, and upon final hearing that the same may be made perpetual.

(*h*) That your orator have such other, further and general relief in the premises as the equities of his case may require and to your Honor may seem meet and proper.

And may it please your Honor to grant unto your orator the State's writ of subpœna in Chancery, issuing out of and
44 under the seal of this Court, and directed to the said defendants, Rome Insurance Company, a corporation under the laws of Georgia; First National Bank of Rome, Georgia, a corporation under the laws of the United States, and Bank of Jasper, a corporation under the laws of Florida, directing and commanding them and each of them to be and *and* appear *for* this Honorable Court at a time and place to be therein designated and under a certain penalty to be therein stipulated, then and there true, perfect and complete answer make, (but not under oath, the oath to said answers being hereby specifically waived) to all and singular the allegations in this bill contained, and to stand to abide by and perform the orders and decree of your Honor in the premises.

And your orator will ever pray, etc.

CARTER & McCOLLUM.

STATE OF FLORIDA,
County of ——, *ss:*

Before me personally appeared —— ——, who being duly sworn, deposes and says that affiant is the complainant in the above entitled cause and has read the foregoing bill and knows the contents thereof, and that the same is true.

B. F. CARTER.

Sworn to and subscribed before me this 3 day of Jan., A. D. 1913.

J. B. WETHERINGTON,
[SEAL.] *C. C. C.*

45 On the 3rd day of January, 1918, complainant filed an affidavit in said case, in words and figures as follows:

In Circuit Court, Hamilton County, Florida.

In Chancery.

B. F. CARTER, Complainant,

vs.

ROME INSURANCE COMPANY et als., Defendants.

Bill for Relief.

STATE OF FLORIDA,
Hamilton County:

Before me personally appeared B. F. Carter, who being duly sworn, on oath says: That affiant is the Complainant in the above entitled cause; that the Defendant, Rome Insurance Company, is a corporation, organized and existing under and by virtue of the laws of Georgia, with its principal office and place of business in the City of Rome, in Floyd County, State of Georgia; and the defendant, American Bank & Trust Company, is a corporation organized and existing under and by virtue of the laws of Georgia, with its principal office and place of business in the City of Rome, in County of Floyd, State of Georgia; and the defendant, First National Bank of Rome, Georgia, is a corporation organized and existing under and by virtue of the laws of the United States with its principal office and place of business in the City of Rome, in Floyd County, State of Georgia; that neither of said corporations is a resident of or domiciled in the State of Florida; that there is no person in the State of Florida, the service of a Subpœna upon whom would bind such defendants, or either of them.

B. F. CARTER.

Sworn to and subscribed before me this the 3 day of Jan., A. D. 1913.

J. B. WETHERINGTON,
[SEAL.] *Clerk Ct. Ct.*

46 On the 3rd day of January, 1914, the Clerk of the Court issued an order of publication, directed to defendants, — was as follows:

To Rome Insurance Company, a corporation under the laws of Georgia; American Bank & Trust Company, a corporation under the laws of Georgia, Trustee, of Rome, Georgia, and to The First National Bank of Rome, Ga., a corporation under the laws of the United States:

It appearing from affidavit accompanying Bill of Complaint filed against you by B. F. Carter, in the Circuit Court of Hamilton County, Florida, in Chancery, on the 3rd day of January, 1913, that you,

and each of you, are non-residents of the State of Florida, and are residents of Rome, Georgia. It is hereby ordered that you and each of you do appear to the bill of complaint on the 21st day of February, A. D. 1913, at the Clerk's office of the said Circuit Court in Jasper, Florida.

It is further ordered that this notice be published in the Jasper News, a weekly newspaper published in Jasper, Hamilton County, Florida, once each week for four successive weeks.

Done and ordered this 3rd day of January, A. D. 1913.

J. B. WETHERINGTON,
[SEAL.] *Clerk Circuit Court.*

47 On the 20th day of February, 1913, the defendants filed Special appearance and motion to quash service by publication, which was as follows:

Special Appearance to Quash Pretended Service by Publication on Rome Insurance Company, American Bank & Trust Company, Trustee, and First National Bank of Rome, Georgia.

In the Circuit Court of Fla., Third Judicial Circuit, in and for Hamilton County, Florida.

In Chancery.

B. F. CARTER, Complainant,

vs.

ROME INSURANCE COMPANY et al., Defendants.

Comes now defendants, Rome Insurance Company, American Bank & Trust Company, Trustee, and First National Bank of Rome, Georgia, by Kay & Doggett, their solicitors and counsel and not appearing generally, but appearing specially, solely and only, and limiting this appearance to what, in contemplation of law amounts only and solely to a special appearance for the purpose of quashing the attempted and pretended service herein, to that end do hereby move to quash said service upon the following grounds, to-wit:

1st. Because on account of the attempted and pretended service by publication, the Court does not acquire jurisdiction of said defendants.

2nd. Because said service is defective and not such as is required by law, in that the defendants are foreign corporations, not resident in Florida, and have not received personal service of process herein in the State of Florida, and to vacate and hold said pretended and attempted service by publication upon these defendants to
48 be for naught; and these defendants pray the judgment of this Honorable Court whether they will be compelled to appear herein or answer hereto, because of the many defects in said pre-

tended service by reason of which no legal service has been had upon these said defendants, nor have said defendants accepted service herein, nor have they voluntarily appeared herein, nor have they waived due service or process upon them.

KAY & DOGGET,
Attorneys and Solicitors,
Appearing Specially, Solely, and Only for the Purpose of This Motion and Limiting the Same to said Purposes.

On the 25th day of February, 1913, the Foreman of The Jasper News, the newspaper in which notice of publication was made, filed an affidavit setting up proof of publication thereof.

On the 25th day of February, 1913, the Clerk of the Circuit Court made and filed a certificate setting up therein that order of publication directed to defendants — was made, published, posted and mailed, in accordance with law.

On the 14th day of March, 1913, the Court made an Order allowing the Complainant to file an amended bill, and overruling the motion of defendants under original bill to quash service had upon them by publication, which said order is in words and figures as follows:

49 In Circuit Court, Third Judicial Circuit of the State of Florida, in and for Hamilton County.

B. F. CARTER

vs.

ROME INSURANCE COMPANY, AMERICAN BANK & TRUST CO., Trustee, THE BANK OF JASPER.

Bill for Relief.

This cause came on to be heard upon motion of defendants, Rome Insurance Company, American Bank & Trust Company, Trustee, to quash and set aside service by publication, insofar as same relates to said defendant, upon notice, and pending the argument of counsel, upon such motion, the complainant made his motion to be allowed to file an amended bill, and upon the consideration, it is ordered and decreed by the Court:

1st. That Complainant's said motion to be allowed to file and amended bill of complaint is hereby granted, and the complainant is hereby allowed ten days in which to file such amended bill.

2nd. That said defendants' said motion to quash and set aside the service by publication as the same appears of record in this proceeding be, and the same is hereby overruled and the defendants are allowed thirty days from this date from which to further plead, proceed, answer or demur.

This March 14, A. D. 1913.

(Signed) M. F. HORNE,
Judge Circuit Court, Hamilton County, Fla.

Duly recorded in Circuit Court Minute Docket No. 11, page 117, this March 14, A. D. 1913.

[SEAL.] M. P. HUNTER,
Clerk.
By G. S. FRINK,
D. C.

50 On the 24th day of March, 1913, Complainant filed his amended bill, which is in words and figures as follows:

Amended Bill of Complaint.

In the Circuit Court of the Third Judicial Circuit of Florida in and for Hamilton County.

In Chancery.

B. F. CARTER, Complainant,

vs.

ROME INSURANCE COMPANY et al., Defendants.

Bill for Relief.

To the Honorable Mallory F. Horne, Judge of the Circuit Court of the Third Judicial Circuit of Florida County in and for Hamilton County, in Chancery sitting:

Your orator, B. F. Carter, a citizen and resident of Hamilton County, Florida, by his undersigned solicitors, by leave of the Court first had and obtained, brings this his bill of complaint against Rome Insurance Company and American Bank & Trust Company, both corporations organized under the laws of Georgia, and both of Rome, Georgia, First National Bank of Rome, a corporation under the laws of the United States, of Rome, Georgia, and the Bank of Jasper, a corporation under the laws of Florida, of Jasper, Florida, defendants, and thereupon your orator would respectfully show unto your Honor, as follows:

1st. That on, to-wit, about the 25 day of Nov., 1911, the defendant Rome Insurance Company was a foreign corporation organized and existing under and by virtue of the laws of the State of Georgia, with its principal place of business at the City of Rome, in said State, and was then and there engaged in the Insurance business, and the defendant, American Bank & Trust Company
51 was on the date aforesaid likewise a corporation organized and existing under and by virtue of the laws of the State of Georgia, with its place of business at Rome, in said State of Georgia, and was engaged in the banking business and acting as trustee for those persons and corporations desiring its services as trustee.

2. That on, to-wit about the 25 day of November, 1911, the said defendant Rome Insurance Company was desirous of offering for sale and selling shares of the capital stock, and in order to effectuate its desire and purpose in that respect it caused to be named as its trustee for such purpose, its co-defendant, the said American Bank & Trust Company, of Rome, Georgia, and authorized the said trustee to offer for sale and sell to persons desiring the same, shares of the capital stock of the said Rome Insurance Company, and which said shares were to be fully paid and non-accessible and of the par value of ten dollars ($10.00) per share, but to be sold by the said trustee at the sum of ($30.00) per share, or on the ratio of $3.00 to be paid for each one dollar ($1.00) par value of stock; and the said Rome Insurance Company and the American Bank & Trust Company in order to effectuate the sale of the capital stock of said Rome Insurance Co., sent their agent or representative into Hamilton County, Florida, where your orator resided and still resides and there solicited your orator to purchase through the said trustee certificates of shares in the capital stock of the said Rome Insurance Company.

3. And your orator further alleges that the said Rome Insurance Company and the American Bank & Trust Company of Rome, Georgia, by and through their said agent or representative, then and there, to-wit, about the 25 day of November, 1911, and in Hamilton County, Florida, approached your orator and opened up negotiations with him for the purpose of inducing your orator to purchase shares of the capital stock of the Rome Insurance Company and then and there falsely and fraudulently and with
52 the intent and purpose to deceive and defraud your orator, represented to your orator, that the shares of the capital stock in the said Rome Insurance Company so offered for sale by the said Rome Insurance Company and the American Bank & Trust Company as Trustee was of great value, to-wit, of the value of three dollars ($3.00) for each one dollar ($1.00) of said capital stock, that your orator was then and there wholly ignorant and uninformed as to the value of said stock, of which ignorance and lack of information the said Rome Insurance Company and American Bank and Trust Company, trustee, knew or ought to have known, and your orator was wholly dependent upon said Insurance Company and its trustee for information with respect to said capital stock, and he believed and relied upon the statements and representations so made to him, as aforesaid, with respect to the value of said stock; that the said Insurance Company, and its said trustee, further falsely and fraudulently and with the intention and purpose to deceive and defraud your orator, then and there represented to him that the said Rome Insurance Company was a solvent corporation and possessed of assets in value far in excess of its liabilities and your orator relied upon and placed confidence in said false representations; and your orator charges that all of said representations aforesaid, so made to him by the said Insurance Company and its trustee, were then and there wholly false

and untrue, and the said Rome Insurance Company and its said trustee well knew the same to be false and untrue, and intended by said false and fraudulent representations to deceive and defraud your orator, and did deceive and defraud him, and by means thereof your orator was induced to purchase and agree to pay for and did purchase and agree to pay for, in reliance upon such false and fraudulent representations 10 shares of the capital stock of said Rome Insurance Company, on the basis of Three Dollars ($3.00) to be paid for each One Dollar ($1.00) face value
53 of said capital stock, and amounting in the aggregate to the sum of 300 dollars so agreed to be paid for by your orator for such capital stock. And your orator further alleges that certificates of shares in capital stock of the said Rome Insurance Company were issued to your orator, and your orator alleges that said capital stock so sold to him was then and there wholly without value and was not then and there worth Three Dollars ($3.00) or any other sum, for each one dollar ($1.00) of the face value thereof, and the said Rome Insurance Company was at that time hopelessly involved and embarrassed financially and was then wholly insolvent, although your orator was not at that time aware of the worthlessness of the capital stock of the Rome Insurance Company, or aware of its insolvency; that both the said Rome Insurance Company and its said trustee, then knew or ought to have known that the capital stock of said Insurance Company was worthless and the said company practically insolvent.

4. And your orator further alleges that by an agreement entered into between your orator and American Bank & Trust Company, as Trustee, for the said Rome Insurance Company and its co-defendants, the said Bank of Jasper, it was then and there, to wit, about the 25 day of November, 1911, and in Hamilton County, Florida, agreed that your orator as consideration to be paid for said shares of the capital stock of the Rome Insurance Company, should execute a note payable to orator's order, for the sum of $300.00, and deposit the same in the said Bank of Jasper, which said bank was to discount said note and issue a certificate of deposit for the proceeds thereof, and said certificate of deposit to be turned over to the American Bank & Trust Company of Rome, Georgia, as such Trustee, and payable at future date; that in pursuant- of the said tri-partite agreement, your orator executed said note and the American Bank & Trust Company and your orator procured a certificate of deposit to be issued for the proceeds thereof, and which proceeds were
54 included in certificate number 319, of the said bank, dated at Jasper, Florida, on the 25th day of November, 1911, and wherein it was certified by W. S. Murrow, as Cashier of the said Bank of Jasper, that said American Bank & Trust Company, as Trustee, had deposited in the said bank, $1,558.26 *dollars*, payable to the orders of itself on return of said certificate properly indorsed, with interest at four per cent per annum, compounded quarterly, and said certificate payable on or after November 25th, 1912; that said certificate was delivered by said Bank of Jasper to the Agent

of Rome Insurance Company and American Bank & Trust Company. Your orator further alleges that in negotiations and agreement with him for the purchase of said shares of the capital stock in the Rome Insurance Company, and the method by which the same should be paid for, including the execution of said note by your orator and the issuance of a certificate of deposit by the said Bank of Jasper, were all discussed and agreed upon by your orator, American Bank & Trust Company, as Trustee, as aforesaid, and the said Bank of Jasper, Florida, in advance of and at the time of said purchase, and the same were contemporaneous and formed but one act and agreement.

5. And your orator would further allege that the note executed by him and referred to in the preceding paragraph is now in the hands of the said Bank of Jasper, Florida, and the certificates of deposit is in the hands of First National Bank of Rome, by virtue of a pretended assignment and transfer thereof, yet the said note is outstanding in the hands of the said bank, and the bank has refused to deliver the same to your orator for cancellation and your orator alleges that the proceeds of said note, to wit; the sum of $— is now in the custody of the said Bank of Jasper, in its banking house in Jasper, Hamilton County, Florida, and has so remained in the custody of said bank since it was deposited therein,
55 and the defendant First National Bank of Rome has demanded and is now demanding of the said bank that it pay over the same to the said defendant, and has claimed and is now claiming and asserting the right thereto, and has claimed and is now claiming that the said proceeds so deposited as aforesaid belongs to said defendant, and orator fears and believes that if said proceeds are paid over to said defendant, they will be removed beyond the jurisdiction of said Court and out of the State of Florida; that by reason of the false, fraudulent representations so made to your orator by the Rome Insurance Company, and the American Bank & Trust Company, Trustee, through their agent and representative, mention whereof is made in the third paragraph of this bill, the purchase of said shares of stock in the said Rome Insurance Company by your orator and the agreement therefore, is and ought to be decreed of no force and effect, as having been purchased by the fraud, deceit, covin and guile of the said Insurance Company and its trustee, American Bank & Trust Company, and the note of your orator now held by the said bank of Jasper, is and ought to be decreed to be wholly void, and of no effect, and the same should be delivered up to your orator, and your orator further alleges that under the circumstances disclosed by the allegations of this bill, the proceeds of said note in the hands of the said Bank of Jasper, defendant, as aforesaid, should be decreed not to belong to the holder of the said certificate of deposit, on account of the said deposit having been induced and procured to be made by this false and fraudulent representations of the said Rome Insurance Company, and the American Bank & Trust Company, as herein set forth and alleged in the event that the note executed by your orator and now

in the hands of the said Bank of Jasper, defendant, should not be held void, under chapter 5717 of the laws of the Florida, then the funds now in the hands of the defendant, Bank of Jasper, as the proceeds of said note, should be decreed to be impressed with
56 a trust in favor of your orator and to belong to him.

6. And your orator would further allege that the pretended contract for the sale and purchase of the said shares of stock in the said Rome Insurance Company, with your orator, made by or on behalf of the said Rome Insurance Company and the said American Bank & Trust Company is and ought to be decreed to be void, because your orator alleges the truth to be that the said Rome Insurance Company and the said American Bank & Trust Company were and each of them was, at the time of making the aforesaid contract with your orator and the execution of said note and the certificate of deposit a foreign corporation and organized by and under the laws of the State of Georgia, and by virtue of Section 1, Chapter *of* 5717 of the Laws of Florida, neither of said corporations were authorized to transact business or to acquire, hold or dispose of property in the State of Florida until it shall have filed in the office of the Secretary of State, a duly authenticated copy of its charter or articles of incorporation, and shall have received from said Secretary of State a permit to transact business in Florida, and your orator alleges that at the time of the making of the pretended contract of sale and purchases of shares of the capital stock of the said Rome Insurance Company by your orator as hereinbefore alleged, and at the time of the execution of said note and the issuance of said certificate of deposit, neither the said Rome Insurance Company, or the said American Bank & Trust Company, had filed in the office of Secretary of State a duly authenticated copy of its charter or articles of incorporation nor had they or either of them received from the Secretary of State a permit to transact business in this State.

7. And your orator alleges that he is ready, willing and able and hereby offers to surrender to the said Rome Insurance Com-
57 pany or its Trustee, the American Bank & Trust Company the certificates of shares of stock issued to him and stands ready and offers to comply with such order and decree of your Honor with respect to the surrender of said certificates as may be entered in this suit.

Inasmuch as your orator is without adequate remedy except in equity, he prays as follows:

(*a*) That your Honor take jurisdiction of the parties and subject matters of this bill, and grant to your orator the relief hereinafter prayed.

(*b*) That the certificate of deposit insofar as the same covers and includes the proceeds derived from the note executed by your orator as hereinbefore alleged, and which certificate was issued by the Bank of Jasper, Florida, to the American Bank & Trust Com-

pany of Rome, Georgia, as Trustee, dated the 25 day of November, 1911, and for the total sum of $1,558.20 *dollars*, be decreed to be void, and,

(*c*) That the note executed by your orator payable to his order for the sum of $300.00, dated the 25 day of November, 1911, and delivered to the Bank of Jasper, Florida, be decreed to be void, and of no effect, and the said bank be required to cancel and surrender the same to your orator,

(*d*) That the pretended contract of agreement made by your orator with the said Rome Insurance Company and the American Bank & Trust Company, its trustee, providing for the sale and purchase of ten shares of the capital stock of the said Insurance Company, be decreed to be wholly void, and of no effect.

(*e*) That the American Bank & Trust Company, Trustee, as aforesaid and the Rome Insurance Company, and each of
58 them, be enjoined and restrained by order of this Court from instituting any suit against your orator on account of the said pretended contract of sales and purchases of shares of stock in the Rome Insurance Company.

(*f*) That the Bank of Jasper, Florida, be restrained by order of this Court from instituting any suit or action to recover on account of the said note executed by your orator, dated the 25th day of November, 1911, and now held by the said Bank of Jasper, Florida.

(*g*) That the said Bank of Jasper, defendant, be restrained and enjoined from paying out of the proceeds of the note executed by your orator dated the 25th day of November, 1911, to the defendant, First National Bank of Rome, or any one for it, and that the defendant First National Bank of Rome, be restrained and enjoined from withdrawing the said proceeds or any part thereof from the said Bank of Jasper, and that said First National Bank of Rome be decreed not to have any right or interest in said proceeds or any part thereof.

(*h*) That in the event the note so executed by your orator shall be held to have been void by virtue of Chapter 5717 of the laws of Florida, then that the proceeds arising therefrom be decreed to be impressed with a trust in favor of your orator and to belong to him and the Bank of Jasper be required to pay the same over to your orator.

(*i*) That the said injunction hereinbefore prayed for be made preliminarily and temporary until the further order of the Court, and upon final hearing that the same may be made perpetual.

(*j*) That your orator have such other, further and general relief in the premises as the equity of his case may require and to your Honor may seem meet and proper.

59 And may it please Your Honor to grant unto your orator the State's writ of subpœna in Chancery, issuing out of and

under the seal of this Court and directed to the said defendants, Rome Insurance Company, a corporation of Rome, Georgia, American Bank & Trust Company, a corporation of Rome, Georgia, First National Bank of Rome, Georgia, and the Bank of Jasper, a corporation of Jasper, Florida, directing and commanding them and each of them to be and appear before this Honorable Court at a time and place to be therein designated and under a certain penalty to be herein stipulated, then and there true, perfect and complete answer make (but not under oath, the oath to said answers being hereby specifically waived) to all and singular the allegations in this bill contained, and to stand to abide by and perform the orders of decree of your Honor in the premises.

S. S. SANDFORD,
CARTER & McCOLLUM,
Of Counsel & Sols. for Complt.

STATE OF FLORIDA,
County of ——, ss:

Before me personally appeared B. F. Carter, who being duly sworn, deposes and says that affiant is the complainant in the above entitled cause and has read the foregoing bill and knows the contents thereof, and that the same is true.

B. F. CARTER.

Sworn to and subscribed before me this the 24th day of March, A. D. 1913.

[SEAL.]

M. P. HUNTER,
Clerk of Circuit Court.

60 On the 3rd day of April, 1913, defendants filed special appearance and motion to quash service under amended bill, which in words and figures is as follows:

Special Appearance to Quash Pretended Service by Publication on the Rome Insurance Co., American Bank & Trust Company, Trustee, and First National Bank of Rome, Georgia.

In the Circuit Court of Florida, Third Judicial Circuit, in and for Hamilton County, Florida.

In Chancery.

B. F. CARTER, Complainant.

vs.

ROME INSURANCE COMPANY et al., Defendants.

Come now the defendants, Rome Insurance Company, American Bank & Trust Company, Trustee, and First National Bank of Rome, Georgia, by Kay & Doggett, their solicitors and counsel and not ap-

pearing generally, but appearing specially, solely and only, and limiting this appearance to what in contemplation of law amounts only and solely to a special appearance for the purpose of quashing the attempted and pretended service herein, to that end do hereby move to quash said service, and to vacate and hold said pretended and attempted service by publication upon the defendants to be for naught, upon the following grounds, to-wit:

1st. Because on account of the attempted and pretended service by publication on, the Court does not acquire jurisdiction of said defendants.

2nd. Because said service is defective and not such as is required by law, in that the defendants are foreign corporations, not resident in Florida, and have not received personal service of process herein in the State of Florida.

61 3rd. Because this is an action in personam, and said defendants have not received personal service of process herein in the State of Florida.

4th. Because as appears upon the face of the record in this cause, legal service of process has not been had upon the said defendants.

And these defendants pray the judgment of this Honorable Court whether they will be compelled to appear herein or answer hereto, because of the many defects in said pretended service, by reasons of which no legal service has been had upon the said defendants, nor have said defendants accepted service herein, nor have they voluntarily appeared herein, nor have they waived due service of process of service upon them.

KAY & DOGGETT,
Attorneys and Solicitors,
Appearing Specially, Solely, and Only for the Purpose of This Motion and Limiting the Same to Said Purposes.

On the 5th day of April, 1913, the Court made an order overruling motion of defendants, under the amended bill, to quash the service, which order is as follows:

Motion to Quash.

In Circuit Court in and for Hamilton County, Florida, in Chancery Sitting.

B. F. CARTER

VS.

ROME INSURANCE CO. et al.

This cause came on to be heard on this day upon motion of
62 the defendant herein to quash service and was argued by counsel for complainants and defendants, and the Court being

advised in the premises, it is upon consideration, ordered and adjudged that said motion to quash service be and the same is hereby overruled, and defendants allowed thirty days from this date in which to plead, answer or demur as they may be advised and complainant allowed ten days thereafter in which to rely as he may be advised.

Done, ordered in vacation at Jasper, Florida, this 3rd day of April, A. D. 1913.

M. F. HORNE,
Judge.

Duly recorded in Circuit Court Minute Docket No. 11, page 130, this April 5th, 1913.

[SEAL.]

M. P. HUNTER,
Clerk.

By G. S. FRINK,
D. C.

On the 10th day of April, 1913, entry of appeal was filed, which said entry is as follows:

Entry of Appeal.

In the Circuit Court, Third Judicial Circuit, in and for Hamilton County, Florida.

In Chancery.

B. F. CARTER, Complainant,

vs.

ROME INSURANCE COMPANY et al., Defendants.

Come now defendants, Rome Insurance Company, American Bank & Trust Company, Trustee, and the First National Bank of Rome, Georgia, by Kay & Doggett, their solicitors and counsel, and not appearing generally but appearing specially, solely and only and limiting the appearing to what, in contemplation of law, amounts only and solely to a special appearance, enter their appeal to the Supreme Court of Florida from the order and decree of the Circuit
63 Court of Hamilton County, Florida, in Chancery, made and entered on the 14th day of March, A. D. 1913, overruling the motion of the said defendants, filed under the original bill of complaint herein, to quash the pretended service by publication attempted to be had herein on the said defendants, the said defendants having appeared specially in the said Circuit Court of Hamilton County, under complainant's original bill herein, solely and only for the purpose of moving the Court to quash and set aside the said attempted and pretended service.

And the said defendants not appearing generally but appearing specially, as aforesaid, enter their further appeal to the Supreme

Court of Florida from a second order and decree of the said Circuit Court of Hamilton County, Florida, in chancery made and entered on the 3rd day of April, A. D. 1913, overruling the motion of the said defendants filed under the amended bill of complaint herein to quash the pretended service by publication attempted to be had herein on the said defendants, the said defendants having appeared specially in the said Circuit Court of Hamilton County, under complainant's amended bill herein, solely and only for the purpose of moving the Court to quash and set aside the said attempted and pretended service. And the said appeals are made returnable to the second Tuesday of June, A. D. 1913, the same being the tenth day of the said month.

Notice is hereby given to the complainant, B. F. Carter, of the taking and entry of said appeals, and the Clerk of the said Circuit Court is hereby directed to forthwith enter and record this entry and motion of appeal in the chancery order book of the said Circuit Court as provided by law.

KAY & DOGGETT,
Attorneys and Solicitors,
Appearing Specially, Solely, and Only for the
Purpose of Appealing from said Orders.

64 Duly recorded in Chancery Order Book No. 3, page 249 this 10th day of April, A. D. 1913.

[SEAL.]

M. P. HUNTER,
Clerk.

By G. S. FRINK,
D. C.

Application for Supersedeas.

In the Circuit Court of Florida, Third Judicial Circuit, in and for Hamilton County, Florida.

In Chancery.

B. F. CARTER

vs.

ROME INSURANCE COMPANY et al.

Come now the defendants, Rome Insurance Company, American Bank & Trust Company, Trustee, and First National Bank of Rome, Georgia, by Kay & Doggett, their Solicitors and Counsel, and not appearing generally, but appearing specially, solely and only and limiting this appearance to what, in contemplation of law, amounts only and solely to a special appearance, apply to the said Court for an order granting and fixing the terms of a supersedeas on the appeal of said defendants heretofore entered and recorded in said case, on the 10th day of April, A. D. 1913.

And further that said order shall operate as of and from the said date of said entry of appeal.

KAY & DOGGETT,
Attorneys and Solicitors,
Appearing Specially, Solely, and Only for the
Purpose of Said Appeal.

65 *Notice to Solicitors for Complainant of Application for Supersedeas.*

In the Circuit Court of Florida, Third Judicial Circuit, in and for Hamilton County, Florida.

In Chancery.

B. F. CARTER

vs.

ROME INSURANCE COMPANY et al.

To Messrs. S. S. Sandford and Carter & McCollum, solicitors for complainant herein:

You will please take notice that on the 19th day of April, A. D. 1913, or as soon thereafter as Counsel can be heard we shall apply to the Honorable M. F. Horne, Judge of said Court at his office in Jasper, Florida, for an order granting the foregoing application for a supersedeas.

KAY & DOGGETT,
Attorneys and Solicitors for Defendants
Rome Insurance Company, American Bank
& Trust Company, Trustee, and First National
Bank of Rome, Georgia, Appearing Only and
Solely for the Purpose of This Appeal.

We, S. S. Sandford, and Carter & McCollum, Solicitors for the above named Complainant, do hereby acknowledge the receipt of a copy of the foregoing application of notice this the 12th day of April, A. D. 1913. We agree that this notice shall in no sense operate as a general appearance in the above cause.

S. S. SANDFORD,
CARTER & McCOLLUM,
Solicitors for Complainant.

66 *Order Granting Supersedeas.*

In the Circuit Court of Florida, Third Judicial Circuit, in and for Hamilton County, Florida.

In Chancery.

B. F. CARTER

vs.

ROME INSURANCE COMPANY et al.

This cause coming on to be heard upon the foregoing application of the defendant, Rome Insurance Company, American Bank & Trust Company, Trustee, and First National Bank of Rome, Georgia, for an order granting and fixing the terms of a supersedeas on appeal:

And the Court having duly inspected the records herein and it appearing that the said defendants have taken and entered their appeal to the Supreme Court of Florida, from an order and decree of this Court made on the 14th day of March, 1913, overruling the said defendants' motion to quash service under the original bill herein filed; that the said defendants have taken and entered their further appeal from an order and decree of this Court made on the 3rd day of April, 1913, overruling the said defendants' motion to quash service under the amended bill herein filed, that these said appeals are made returnable to a day more than thirty and not more than ninety days from the date of the recording of the said appeals, to-wit: the second Tuesday of June, A. D. 1913, the same being the tenth day of said month.

It is therefore ordered, adjudged and decreed that the said appeals operate as a supersedeas as of and from the said 10th day of April, 1913, and that all proceedings herein be stayed pending said appeals and until the final disposition thereof upon the giving by the said defendants of a bond in terms as provided by law, payable to the complainant, B. F. Carter, to be approved by the Clerk of the Circuit Court, in the sum of $250.00, conditioned to pay all of the
67 costs which may be occasioned by the entry and prosecution of said appeals if said decree of the said Circuit Court shall be affirmed by the said Supreme Court.

Done and ordered and decreed this 19th day of April, A. D. 1913.

M. F. HORNE,
Judge.

Duly recorded in Circuit Court Minute Book No. 11, page 139, this April 19th, 1913.

[SEAL.]

M. P. HUNTER,
Clerk.

By G. S. FRINK,
D. C.

On the 3rd day of May, 1913, the defendants filed their Supersedeas Bond, which, with the approval thereof by the Clerk, is in words and figures as follows:

Supersedeas Bond.

In the Circuit Court of Florida, Third Judicial Circuit, in and for Hamilton County.

In Chancery.

B. F. CARTER

vs.

ROME INSURANCE COMPANY et al.

Know all men by these presents, that we, Rome Insurance Company, a corporation, American Bank & Trust Company, a corporation, Trustee, and the First National Bank of Rome, Georgia, a corporation, as Principals, and the American Surety Company of New York, a corporation, as Surety, are held and firmly bound unto B. F. Carter, his executors, administrators and assigns, in the sum of Two Hundred and fifty dollars ($250.00) lawful money of the United States of America, for the payment whereof well and truly to be made, we bind ourselves and our assigns, jointly and severally, firmly by these presents, this bond being a supersedeas bond on a special appeal from two orders of the said Circuit Court overruling two motions of the defendants, Rome Insurance Company, American Bank & Trust Company, Trustee, and the First National Bank of Rome, Georgia, to quash the service by publication herein attempted to be had upon them, the said motions being made under a special appearance and the said defendants not having appeared generally in the said Circuit Court, but only specially for the purpose of making said motion, and this bond is limited to such a supersedeas bond, solely and only for the purpose of the said appeal and is in no way to constitute a general appearance in the cause by any of the said defendants.

Signed and sealed by the said Rome Insurance Company, a corporation, American Bank and Trust Company, a corporation, Trustee, and the First National Bank of Rome, Georgia, a corporation by their respectively duly authorized officers, on this the 29th day of April, A. D. 1913, at Rome, Georgia, and by the said American Surety Company, of New York, by W. E. Kay, its Resident Vice-President, duly authorized to execute this bond at Jacksonville, Florida, on this 2nd day of May, A. D. 1913.

The condition of this obligation is such that whereas the said defendants in the above entitled cause have taken and entered their special appeal to the Supreme Court of Florida, from an order and decree of the said Circuit Court in Chancery, made and entered on the 14th day of March, 1913, overruling the motion of the said de-

fendants filed under the original bill of complaint herein to quash the pretended service by publication attempted to be had on the said defendants; and whereas the said defendants have taken and entered their further special appeal from a second order and decree of the said Circuit Court in Chancery, made and entered on the 3rd day of April, 1913, overruling the motion of the said defendants filed under the amended bill of complaint herein to quash the pretended
69 service by publication attempted to be had herein on the said defendants, both of the said special appeals having been made returnable to the second Tuesday of June, A. D. 1913, same being the tenth day of the said month, and whereas by a further order and decree of the said Circuit Court it was ordered that the said special appeals operate as a supersedeas, and that all proceedings in said suit be stayed until final disposition thereof upon the defendants giving bond payable to the said complainant in the sum of Two hundred and Fifty Dollars ($250.00) conditioned to pay all costs which may be occasioned by the entry and prosecution of said special appeals if said decree shall be affirmed by said Supreme Court.

Now, therefore, if the said defendants shall pay or cause to be paid all costs which may be occasioned by the entry and prosecution of said special appeals, if the said decrees appealed from shall be affirmed by said Supreme Court, then this obligation to be void; otherwise to remain in full force and virtue.

[SEAL.] ROME INSURANCE COMPANY,
By J. C. PORTER,
Vice-Pres.

Attest:

J. R. SEAL. [SEAL.]
Secretary Rome Insurance Co.

FIRST NATIONAL BANK,
By B. F. HUGHES,
Pres.

[SEAL.] AMERICAN BANK & TRUST CO.,
Trustee, &c.

STATE BANK OF ROME,
By J. H. O'NEILL,
1st V. P.

[SEAL.] AMERICAN SURETY COMPANY,
By W. E. KAY,
Residing Vice-President.

Attest:

W. M. STOCKTON,
Residing Assistant Secretary.

70 Taken and approved by me this 3rd day of May 1913.
M. P. HUNTER,
[SEAL.] *Clerk of said Court.*

On the 28th day of April, 1913, assignment of errors, with service of copy on opposing counsel, was filed, which is in words and figures as follows:

Assignment of Errors.

In the Circuit Court of Florida, Third Judicial Circuit, in and for Hamilton County, Florida.

In Chancery.

B. F. CARTER

vs.

ROME INSURANCE COMPANY et al.

Come now the defendants, Rome Insurance Company, American Bank & Trust Company, Trustee, and First National Bank of Rome, Georgia, by Kay & Doggett, their solicitors and counsel, and not appearing generally, but appearing specially, solely and only, and limiting their appearance to what, in contemplation of law, amounts only and solely to a special appearance, and at the time of filing their directions to the Clerk for making up a transcript herein, assign the following errors, upon which they intend to rely for a reversal by the Supreme Court of the State of Florida, of the orders and decrees herein appealed from, to-wit:

First. That the Court erred in overruling the motion of the defendants herein, Rome Insurance Company, American Bank & Trust Company, Trustee, and the First National Bank of Rome, Georgia, filed under the original bill herein to quash by publication attempted to be had upon said defendants.

71 Second. That the Court erred in overruling the motion of the defendants, Rome Insurance Company, American Bank & Trust Co., Trustee, and the First National Bank of Rome, Georgia, filed under the amended bill herein to quash service by publication attempted to be had upon the said defendants.

KAY & DOGGETT,
Attorneys and Solicitors for said Defendants,
Appearing Only Specially for the
Purpose of said Appeal.

Copy of foregoing assignment of errors received and service thereof accepted, this 26 day of April, 1913.

S. S. SANFORD,
CARTER & McCOLLUM,
Solicitors for Complainant.

On the 28th day of April, 1913, written direction to the Clerk for making up transcript of record, with service of copy to opposing counsel, was filed, which is in words and figures as follows:

Directions to Clerk.

In the Circuit Court of Florida, Third Judicial Circuit, in and for Hamilton County.

In Chancery.

B. F. CARTER

vs.

ROME INSURANCE COMPANY et al.

Comes now the defendants, Rome Insurance Company, American Bank & Trust Company, Trustee, and First National Bank of Rome, Georgia, by Kay & Doggett, their solicitors and counsel, and not appearing generally but appearing specially, solely and only
72 and limiting their appearance to what in contemplation of law amounts only and solely to a special appearance and hereby direct the Clerk of the aforesaid Court to commence the making up of the transcript of record in the above case on the 14th day of May, A. D. 1913, and in the making of said transcript, the said Clerk will be governed by the following directions, and instructions, to-wit:

1st. Recite the filing of the original bill, January 3rd, 1913.

2nd. Copy the original bill of complaint, filed January 3rd, 1913.

3rd. Recite the filing of the affidavit of B. F. Carter, January 3rd, 1913.

4th. Copy the affidavit of B. F. Carter filed January 3rd, 1913.

5th. Recite the issuance of the order of publication on the aforesaid defendant, January 3rd, 1913.

6th. Copy Order of publication on the said defendant, issued January 3rd, 1913.

7th. Recite the filing of the Special Appearance and Monition to quash by the aforesaid defendants, February 20th, 1913.

8th. Copy Special appearance and monition to quash, filed February 20th, 1913.

9th. Recite the filing of affidavit of publication, February 5th, 1913.

10th. Recite the filing of the certificate of the Clerk, February 25th, 1913, that the order of publication was made.

73 11th. Recite the filing of the order of the Court allowing the complainant to file the amended bill, overruling the motion of aforesaid defendants under the original bill to quash

service attempted to be had upon them by publication, the said order being filed March 11th, 1913.

12th. Copy the said order of the Court, filed March 14th, 1913.

13th. Recite the filing of the amended bill, March 24th, 1913.

14th. Copy the amended bill filed March 24th, 1913.

15th. Recite the filing of the motion to quash service under the amended bill by the defendants aforesaid under special appearance filed April 3rd, 1913.

16th. Copy the said special appearance and motion to quash under the amended bill filed April 3rd, 1913.

17th. Recite the filing of the order of the Court overruling the motion of the said defendants under the amended — to quash service attempted to be had upon them, the said order being filed April 5th, 1913.

18th. Copy the said Order of the Court filed April 5th, 1913.

19th. Recite the filing of entry of appeal April 10th, 1913.

20th. Copy the entry of appeal, filed April 10th, 1913, and the certificate showing record of the same in accordance with the law.

21st. Copy the applications for order of Supersedeas notice of such application, the acknowledgment of such notice, and the order granting and filing the terms of supersedeas.

71 22nd. Recite the fixing of and copy supersedeas bond, and the order approving same.

23rd. Recite the filing of and copy assignment of errors and service of copy on opposing counsel.

24th. Recite the filing of and copy directions to the Clerk for the preparations of the transcript and service of copy to opposing counsel.

25th. Certify as — the correctness of the transcript in accordance with the law.

26th. Omit all other papers.

KAY & DOGGETT,
Attorneys and Solicitors for said Defendants,
Appearing Only Specially for the Purpose of This Appeal.

Copy the foregoing directions to the Clerk, received on this the 26th day of April, A. D. 1913.

S. S. SANDFORD,
CARTER & McCOLLUM,
Solicitors for Complainant.

STATE OF FLORIDA,
Hamilton County:

I, Melvin P. Hunter, Clerk of the Circuit Court of the Third Judicial Circuit, in and for Hamilton County, Florida, do hereby certify that the foregoing pages numbered from one to thirty-seven inclusive, contains a correct transcript of the record of the order of the said Court entered the 14th day of March, A. D. 1913, overruling the monition to quash service attempted to be had upon the defendant, Rome Insurance Company, American Bank & Trust Company, Trustee, and the First National Bank of Rome, Georgia, filed under the original bill of complaint, and a correct transcript of the record of the order of the said Court entered the third day of April, A. D. 1913, overruling the motion to quash service attempted to be had upon the defendant, Rome Insurance Company,
75 American Bank & Trust Company, Trustee, and the First National Bank of Rome, Georgia, filed under the amended bill of complaint, these orders and this transcript of record being those of the cause in Chancery of B. F. Carter, Complainant, against the Rome Insurance Company, et al., defendant, and this transcript being a true and correct recital and copy of all such papers and proceedings in such cause as appears upon the records and files in my office that have been directed to be included in said transcript by the written demand of said parties.

In witness thereof, I have hereunto set my hand and affixed the seal of the said Circuit Court, this the 22nd day of May, A. D. 1913.

[SEAL.] MELVIN P. HUNTER,
Clerk of Circuit Court in and for Hamilton County, Florida.

In the Supreme Court of Florida, June Term, A. D. 1913.

ROME INSURANCE COMPANY, a Georgia Corporation, and Others, Appellants,

vs.

B. F. CARTER, Appellee.

Hamilton County.

Per Curiam:

This case cannot be distinguished from that of Rome Insurance Company, vs. J. H. Corbett, this day decided, and upon the opinion therein, the order herein appealed from is affirmed.

All Concur.

Exhibit E.

76 In the Supreme Court of Florida, June Term, A. D. 1913.

ROME INSURANCE COMPANY, a Georgia Corporation, and Others, Appellants.

vs.

J. H. CORBETT, Appellee.

Hamilton County.

CROCKELL, *J.*:

A bill was filed in the Circuit Court for Hamilton County against local defendants and also certain non-residents corporations seeking to impound a fund in that county arising out of an alleged fraudulent transaction consummated in that County. Constructive service, in perfect accordance with the Statute was had by publication, and the non-residents corporations appeared specially to quash the service upon the theory that the sole relief prayed was in personam, and that therefore the statute authorizing constructive service by publication does not apply. This motion having been denied these non-residents have sued out what they term a special appeal.

It may well be that this appeal so operates as a general appearance in the Circuit Court, as to render the question before us a moot one, but the Appellee does not ask us to so hold, and it appears that this is but a test case, upon the decision of which many other cases in that Court are depending.

The Bill confines its prayer to an adjudication of the funds sought to be impounded, and does not pray for a general personal decree against these non-residents and we are not to assume upon the face of the bill that the Circuit Court will enter an unauthorized decree; and we have not before us any such question of jurisdiction as was involved in the case of Pennoyer v. Neff, 95 U. S., 714.

77 The purpose of the statute authorizing constructive service by publication is to notify non-residents of the pending suit so that they may if they care to do so, come into the case and if the statute be followed, there is no right in the non-resident to quash this notice; he has his right if not waived to object should the Court thereafter commit an error against him.

Our constructive service statute is broad enough to apply to any suit in equity pending in our Circuit Court and as has been said in Kilpatrick v. Post, 53 N. J. Eq. 591 text 597; 32 Atl. Rep. 267, cannot be confined in its operation to the cases where the Court might make final decree or judgment. Further that Court says: "It was not intended, that the question of the power to enter the ultimate decree or judgment should enter into the question of the right to give notice of the suit to a non-resident or that this question of jurisdiction should be settled on a motion to discharge the order of publication. The Complainant is entitled to have the question of jurisdiction settled by a final decree."

We are not to be understood as holding that the Court might

not quash a service by publication, if the bill upon its face showed that it was clearly a common law cause of action, and that the resort to the equity side of the Court was a subterfuge; the bill before us does not present that case.

The Order is affirmed:

Shackleford, C. J., and Taylor, Hocker and Whitfield, JJ., concur.

Exhibit F.

78 *Mandate from Supreme Court.*

THE STATE OF FLORIDA:

To the Honorable the Judge of the Circuit Court for the Third Judicial Circuit of Florida, Greetings:

Whereas, lately in and for the Circuit Court of the Third Judicial Circuit of Florida, in and for the County of Hamilton, in a cause wherein B. F. Carter was complainant, and Rome Insurance Company, a corporation, American Bank & Trust Company, a corporation, First National Bank of Rome, Georgia, a corporation, and Bank of Jasper, a corporation, were defendants, the order of said Circuit Court was rendered April 15th, 1913, as by the inspection of the transcript of the record of the said Circuit Court, which was brought into the Supreme Court of the State of Florida; by virtue of an appeal agreeably to the laws of said State in such case made and provided fully and at large appears:

And whereas, at the June Term of said Supreme Court, holden at Tallahassee, A. D. 1913, the said cause came on to be heard before the said Supreme Court on the said transcript of the record, and was argued by counsel: in consideration whereof, on the 9th day of December, A. D. 1913, it was considered by said Supreme Court that the said Order of the Circuit Court, be and the same is hereby affirmed; It is further ordered that the Appellee do have and recover of and from the Appellants his cost by him in this behalf expended which cost- are taxed at the sum of —, therefore,

You are hereby commanded, that such further proceedings be had in said cause as according to right, justice, the judgment of said Supreme Court, and the laws of the State of Florida, ought to be had.

79 Witness, the Honorable Thomas M. Shackleford, Chief Justice of said Supreme Court, and the seal of said Court at Tallahassee, this 10th day of January, 1914.

[SEAL.] M. H. MABRY,
Clerk Supreme Court of Florida.

January 10, 1914.

Original mailed to Clerk Circuit Court for Hamilton County, Fla.

"Exhibit G."

Special Appearance to Quash Pretended Service by Publication on Rome Insurance Company and American Bank & Trust Co., Trustee.

In the Circuit Court of Florida, Third Judicial Circuit, in and for Hamilton County, Florida.

In Chancery.

J. R. BROWN, Complainant,

vs.

ROME INSURANCE COMPANY et al., Defendants.

Come now defendants, Rome Insurance Company, and American Bank & Trust Company, Trustee, by Kay & Doggett, their solicitors and counsels, and not appearing generally, but appearing specially, solely and only, and limiting this appearance to what, in contemplation of law amounts only and solely to a special appearance for the purpose of quashing the attempted and pretended service herein, to that end, do hereby move to quash said service upon the following grounds, to-wit:

1st. Because, on account of the attempted and pretended service by publication, the Court does not acquire jurisdiction of said defendants.

80 2nd. Because said service is defective and not such as is required by law, in that the defendants are foreign corporations not residents in Florida, and have not received personal service of process herein in the State of Florida. And to vacate and hold said pretended and attempted services by publication upon these defendants to be for naught; and these defendants pray that the judgment of this Honorable Court whether they will be compelled to appear herein, or answer hereto, because of the many defects in said pretended service, by reason of which no legal service has been had upon the said defendants, nor have said defendants accepted service herein, nor have they voluntarily appeared herein, nor have they waived due service of process upon them.

KAY & DOGGETT,
Attorneys and Solicitors,
Appearing Specially, Solely, and Only for the Purpose of This Motion and Limiting the Same to said Purpose.

Exhibit H.

Special Appearance to Quash Pretended Service by Publication on Rome Insurance Company and American Bank & Trust Company, Trustee.

In the Circuit Court of Florida, Third Judicial Circuit, in and for Hamilton County, Florida.

In Chancery.

J. R. BROWN, Complainant,

vs.

ROME INSURANCE COMPANY et al., Defendants.

Come now defendants, Rome Insurance Company and American Bank & Trust Company, Trustee, by Kay & Doggett, their solicitors and counsel, and not appearing generally, but appearing specially, solely and only, and limiting this appearance to what, in
81 contemplation of law, amounts only and solely to a special appearance for the purpose of quashing the attempted and pretended service herein, to that end do hereby move to quash said service and to vacate and hold said pretended and attempted service by publication upon these defendants to be for naught, upon the following grounds, to-wit:

1st. Because, on account of the attempted and pretended service by publication, the Court does not acquire jurisdiction of said defendant.

2nd. Because said service is defective and not such as is required by law, in that the defendants are foreign corporations, not resident in Florida and have not received personal service of process herein, in the State of Florida.

3rd. Because this is an action in personam, and said defendants have not received personal service of process herein in the State of Florida.

4th. Because as appeared upon the face of the record in this cause, legal service of process has not been had upon the said defendants.

And these defendants pray the judgment of this Honorable Court whether they will be compelled to appear herein, or answer hereto, because of the many defects in said pretended service, by reason of which no legal service has been had upon the said defendants, nor have said defendants accepted service herein, nor have they voluntarily appeared herein, nor have they waived due service of process upon them.

KAY & DOGGETT,
Attorneys and Solicitors,
Appearing Specially, Solely, and Only for the Purpose of This Motion and Limiting the Same to Said Purpose.

"Exhibit J."

82 *Stipulation of Counsel.*

In the Circuit Court, Third Judicial Circuit, in and for Hamilton County, Florida.

In Chancery.

J. R. Brown

vs.

Rome Insurance Company et al.

It is hereby stipulated and agreed by and between S. S. Sandford and Carter & McCollum, Solicitors for the Complainant herein, and Kay & Doggett, who have not appeared generally, but who have appeared only specially as solicitors for the defendant herein, Rome Insurance Company, American Bank & Trust Company and the First National Bank of Rome, Georgia, and who are making this agreement specially solely for the purpose herein expressed.

That proceedings in this cause be stayed pending the prosecution of an appeal from the order of the Court overruling the motion of the said defendants to quash service in the case of B. F. Carter vs. Rome Insurance Company, et al., which said case is now on file and being prosecuted in this Court;

That the ultimate decision of the said appeal in the said case of B. F. Carter vs. Rome Insurance Company shall be decisive of the validity of the service by publication on the said defendants in this case, and if the service in the said Carter case be ultimately held defective, and ordered quashed, then the service in this case, the validity of which involves identically the same legal question as that in the Carter case shall be held defective and shall be quashed; and

That this stipulation of counsel shall not be considered as constituting a general appearance of the said defendant in this cause.

83 This agreement being signed and entered into this 10th day of April, A. D. 1913.

——— ———,

——— ———,

Solicitors for Complainants.

———,

Solicitors for Defendants Rome Insurance Company, American Bank & Trust Company, and First National Bank of Rome, Georgia, Who Appeared Only Specially in Said Cause.

"Exhibit K."

Indorsed: Replication to Additional Pleas of the Defendant. Filed June 15th, 1915. W. L. Devore, Clerk.

Motion to Strike Replications.

In the District Court of United States, Southern District of Florida.

AMERICAN BANK & TRUST COMPANY OF ROME, GEORGIA, Plaintiff,

vs.

THE BANK OF JASPER, of Jasper, Florida, Defendant.

Comes now the defendant by S. S. Sandford and Carter & McCollum, its attorneys, and moves the Court to strike the replications, severally, filed by the plaintiff to the additional plea of defendant to the 1st and 2nd counts of plaintiff's declaration, on the following grounds, to be taken and applied, severally, to each of said replications:

84 1. Because said replication does not avoid the allegations of the plea.

2. Because said replication admits the allegations of the plea which has been held by the Court to constitute a good defense.

3. Because said replication presents no issue to be tried.

4. Because said replication sets up no matter which avoids the material allegations of the plea.

5. Because said replication presents the same matter passed upon by this Court in ruling upon plaintiff's demurrer to the plea, filed August 3rd, 1914.

6. Because said replication presents wholly immaterial matter.

7. Because said replication is so framed as to prejudice, embarrass and delay the fair trial of the issues.

CARTER & McCOLLUM,
S. S. SANDFORD,
Attorneys for Defendant.

Demurrer to Replications.

In the District Court of the United States, Southern District of Florida.

AMERICAN BANK & TRUST COMPANY OF ROME, GEORGIA, Plaintiff,

vs.

THE BANK OF JASPER, of Jasper, Florida, Defendant.

85 Now comes the defendant in the above entitled cause by S. S. Sandford and Carter & McCollum, its attorneys, and demurs to plaintiff's replications, severally, to defendant's ad-

ditional plea to the 1st and 2nd counts of plaintiff's declaration, and says that said replication is bad in substance and insufficient in law.

CARTER & McCOLLUM,
S. S. SANDFORD,
Attorneys for Defendant.

Substantial matters of law to be argued and insisted upon as applicable to said replications, severally:

1. Said replication does not avoid the allegations of the plea.

2. Said replication admits the material allegations of said plea and does not set forth any matter in avoidance of the same.

3. Said replication shows that plaintiff has no cause of action against the defendant.

4. Said replication neither confesses and avoids or traverses and denies the said plea.

5. Said replication presents no issuable matter in avoidance of said plea.

6. Said replication shows jurisdiction in the State Court, and the entry of a valid decree by said Court.

7. Said replication shows that the said proceedings in the State Court was for the purpose of impounding a particular fund and the decree of the State Court was to that effect, and, therefore, a binding and valid decree without personal service on the plaintiff herein.

8. Said replication shows that the plaintiff in this cause by its own act voluntarily submitted itself to the jurisdiction of the State Court.

86 9. Said replication shows that the plaintiff in this cause voluntarily submitted itself to the jurisdiction of the State Court and sought affirmative relief therefrom, and, therefore, the final decree entered against it was of binding force and effect.

CARTER & McCOLLUM,
S. S. SANDFORD,
Attorneys for Defendant.

I, Ira J. Carter, do hereby certify that I believe the foregoing demurrer is well founded in law.

IRA J. CARTER,
Attorney for Defendant.

STATE OF FLORIDA,
County of Duval:

Before me personally appeared Ira J. Carter, who being first duly sworn, deposes and says that he is one of the attorneys for the defendant in the above entitled cause and that the foregoing demurrer is not interposed for the purpose of delay.

[SEAL.] IRA J. CARTER.

Sworn to and subscribed before me this 5th day of July, 1915.

J. T. CRAWLEY,
Notary Public.

Indorsement: Motion to Strike and Demurrer to Replications Filed July 5, 1915. W. L. Devore, Clerk.

In the United States District Court, Southern District of Florida.

76-3.

AMERICAN BANK & TRUST COMPANY OF ROME, GEORGIA,

vs.

THE BANK OF JASPER, FLORIDA.

This cause coming on to be heard upon the demurrer to and motions to strike the replications filed by plaintiff to defendant's 87 additional pleas to the first, second, third, fourth and fifth counts of the declaration, and the same having been argued and submitted,

It is considered that said demurrers be and each of them is hereby sustained.

Done this February 2, 1917.

RHYDON M. CALL,
District Judge.

The questions sought to be raised by these replications are the questions passed on by this Court in its ruling on the demurrer to the pleas. I adhere to the ruling then made.

RHYDON M. CALL,
Judge.

Indorsed: Order sustaining Demurrer. Feb'y 2, 1917. E. R. Williams, Clerk.

Stipulation.

In the District Court of the United States Within and for the Southern District of Florida.

AMERICAN BANK & TRUST COMPANY OF ROME, GEORGIA, Plaintiff,

vs.

THE BANK OF JASPER, a Corporation under the Laws of Florida and Doing Business at Jasper, Florida.

It is hereby stipulated and agreed by and between the parties in above entitled cause, by and through their respective attorneys of record herein, as follows:

1. That all pleas filed by the defendant herein be withdrawn from the files of this cause save and excepting only the additional
88 pleas filed by the defendant herein on August 3rd, 1914, it being understood and hereby stipulated that the defendant may re-file in said cause said pleas or any of them whenever it may deem advisable to do so, and that upon the re-filing of any or all of said withdrawn pleas, the record herein as to such re-filed pleas and pleadings subsequent thereto shall stand as it stands with respect to such re-filed pleas at the date of this stipulation.

2. That the pleadings herein be amended so that the corporate name of the plaintiff herein shall be changed from American Bank & Trust Company to The State Bank of Rome, this change in the corporate name of said plaintiff having been made since the institution of this suit under and by virtue of the laws of the State of Georgia.

Signed at Jacksonville, Florida, this 8th day of January, A. D. 1919.

O. O. McCOLLUM.
S. S. SANDFORD.
F. P. FLEMING,
Att'ys for Defendant.
W. E. KAY.
J. L. DOGGETT,
Attorneys for Plaintiff.

Indorsed: Stipulation. Filed Jan. 9, 1919. E. R. Williams, Clerk.

89 *Declination to Plead Further.*

In the United States District Court Within and for the Southern District of Florida.

THE STATE BANK OF ROME, a Corporation under the Laws of Georgia and Doing Business at Rome, Georgia, Plaintiff.

vs.

THE BANK OF JASPER, a Corporation under the Laws of Florida and Doing Business at Jasper, Florida, Defendant.

And now comes the plaintiff in the above entitled cause, by its undersigned attorneys of record herein, and, in view of the stipulation this day entered into by and between the parties herein, the plaintiff does hereby elect to stand upon its demurrer to defendant's pleas filed herein on August 3rd, 1914, and upon its replications to said pleas, to which replications the Court has sustained a demurrer, and the plaintiff does hereby decline to plead further in this cause.

W. E. KAY,
J. L. DOGGETT,
Attorneys for Plaintiff.

Indorsed: Declination to Plead Further. Filed January 9, 1919. E. R. Williams, Clerk.

90 In the United States District Court Within and for the Southern District of Florida.

THE STATE BANK OF ROME, a Corporation under the Laws of Georgia and Doing Business at Rome, Georgia, Plaintiff,

vs.

THE BANK OF JASPER, a Corporation under the Laws of Florida and Doing Business at Jasper, Florida, Defendant.

Comes now the defendant in the above entitled cause, and moves the Court for the entry of judgment final herein in favor of the defendant, consequent upon the sustaining of defendant's demurrer to the replication of the plaintiff herein filed June 15th, 1915, to the additional pleas of the defendant herein filed on the 3rd day of August, 1914.

O. O. McCOLLUM.
S. S. SANDFORD,
F. P. FLEMING,
Attorneys for Defendant.

Indorsed: Final Judgment. Filed Jan. 9, 1919. E. R. Williams, Clerk.

91 *Final Judgment.*

In the United States District Court Within and for the Southern District of Florida.

THE STATE BANK OF ROME, a Corporation under the Laws of Georgia and Doing Business at Rome, Georgia, Plaintiff,

vs.

THE BANK OF JASPER, a Corporation under the Laws of Florida and Doing Business at Jasper, Florida, Defendant.

This cause came on this day for hearing upon the Motion of the defendant for judgment in its favor consequent upon the sustaining of defendant's demurrer to the Replication of the plaintiff filed herein on June 15th, 1915, and it appearing to the Court from the records and files in this cause that the demurrer to said replications was sustained by the Court on the 2nd day of February, 1917, and that the plaintiff has this day filed in said cause its written declination to plead further therein, and has thereby elected to stand upon its demurrer, to defendant's additional pleas filed herein on August 3rd, 1914, which demurrer was overruled by the Court, and upon its replication to said pleas, to which replication the Court has sustained demurrer of the defendant:

It is thereupon considered by the Court that the said plaintiff, The State Bank of Rome, a corporation under the laws of Georgia, take nothing by its said writ and declaration, and that the defendant go hence without day.

It is further considered by the Court that the defendant do have and recover of and from the plaintiff its costs in this behalf, and here taxed at — Dollars, for which execution may issue.

62 Considered and Ordered at Jacksonville, Florida, this January 9th, 1919.

RHYDON M. CALL,
Judge.

Indorsed: Final Judgment.

Assignment of Errors.

In the District Court of the United States, Southern District of Florida.

THE STATE BANK OF ROME, a Corporation under the Laws of Georgia and Doing Business at Rome, Georgia, Plaintiff.

v.

THE BANK OF JASPER, a Corporation under the Laws of Florida and Doing Business at Jasper, Florida.

And now comes the Plaintiff in the above styled cause by its undersigned Attorneys, and assigns as error the following rulings and decisions of the District Court herein, that is to say:

First. The Court erred in overruling plaintiff's demurrer to defendant's additional plea to the first Count of plaintiff's declaration. This assignment of error is based on the ground that said additional plea attempts to set up as a bar to the cause of action set forth in said first count of the declaration, a Chancery Decree of the Circuit Court of Hamilton County, Florida, which decree is null and void as to the plaintiff herein, for the reason that said decree was not obtained through due process of law, and is a decree in personam, founded solely upon constructive service by publication in an equity suit in personam, in which equity
63 suit the plaintiff herein did not enter a general appearance.

Second. The Court erred in overruling plaintiff's demurrer to defendant's additional plea to the second count of plaintiff's declaration. This assignment of error is based on the ground that said additional plea attempts to set up as a bar to the cause of action set forth in said second count of the declaration, a Chancery decree of the Circuit Court of Hamilton County, Florida, which decree is null and void as to the plaintiff herein, for the reason that said decree was not obtained through due process of law, and is a decree in personam, founded solely upon constructive service by publication in an equity

suit in personam, in which equity suit the plaintiff herein did not enter a general appearance.

Third. The Court erred in overruling plaintiff's demurrer to the defendant's additional pleas filed August 3rd, 1914, to the first and second counts of plaintiff's declaration.

This assignment of error is based on the ground that each of said additional pleas attempts to set up as a bar to the cause of action set forth in said first, and second counts of the declaration, a chancery decree of the Circuit Court of Hamilton County, Florida, which decree is null and void as to the plaintiff herein, for the reason that said decree was not obtained through due process of law, and is a decree in personam, founded solely upon constructive service by publication in an equity suit in personam, in which equity suit the plaintiff herein did not enter a general appearance.

Fourth. The Court erred in sustaining defendant's demurrer to plaintiff's replication to defendant's additional plea to the first count of plaintiff's declaration.

This assignment of error is based upon the ground that said replication shows and sets forth any and all proceedings in said
94 Chancery suit in the Circuit Court of Hamilton County, Florida, in which the plaintiff herein participated in any manner whatsoever, and thereby shows that said additional plea attempts to set up as a bar to the cause of action set forth in said first count of the declaration, a chancery decree of the Circuit Court of Hamilton County, Florida, which decree is null and void as to the plaintiff herein, for the reason that said decree was not obtained through due process of law and is a decree in personam, founded solely upon constructive service by publication in an equity suit in personam, in which equity suit the plaintiff herein did not enter a general appearance.

Fifth. The Court erred in sustaining defendant's demurrer to plaintiff's replication to the defendant's additional plea to the second count of plaintiff's declaration.

This assignment of error is based on the ground that said replication shows and sets forth any and all proceedings in said Chancery suit in the Circuit Court of Hamilton County, Florida, in which the plaintiff herein participated in any manner whatsoever and thereby shows that the said additional plea attempts to set up as a bar to the cause of action set forth in said count of the declaration, a chancery decree of the Circuit Court of Hamilton County, Florida, which decree is null and void as to the plaintiff herein, for the reason that said decree was not obtained through due process of law, and is a decree in personam, founded solely upon constructive service by publication in an equity suit in personam, in which equity suit the plaintiff herein did not enter a general appearance.

Sixth. The Court erred in sustaining the demurrer to the replication filed by plaintiff to defendant's additional pleas to the first and second counts of the declaration.

This assignment of errors is based on the ground that said replication shows and set- forth any and all proceedings in said
5 Chancery suit in the Circuit Court of Hamilton County, Florida, in which the plaintiff herein participated in any manner whatsoever, and thereby shows that said additional pleas attempt to set out as a bar to the cause of action set forth in said first and second counts of the declaration, a chancery decree of the Circuit Court of Hamilton County, Florida, which decree is null and void as to the plaintiff herein, for the reason that said decree was not obtained through due process of law and is a decree in personam, founded solely upon constructive service by publication in an equity suit in personam, in which equity suit the plaintiff herein did not enter a general appearance.

Seventh. The Court erred in entering final judgment on demurrer for defendant.

This assignment of error is based on the ground that, under the facts set forth in defendant's additional pleas and in plaintiff's replication thereto, which facts are admitted under the pleadings, it affirmatively appears that said pleas set forth no defense to the cause of action set forth in the first and seconds counts of plaintiff's declaration.

Wherefore, and for divers other grounds appearing upon the record, plaintiff prays that the said several rulings, decisions and judgment may be reversed.

W. E. KAY,
J. L. DOGGETT,
L. A. DEAN,
J. E. DEAN,
HENRY C. CLARK,
Attorneys for Plaintiff.

Indorsed: Assignment of Errors. Filed June 23, 1919. E. R. Williams, Clerk.

6 Writ of Error omitted from the Printed Record, being filed in the original.

* * * * * * *

Bond for Costs.

In the District Court of the United States, Southern District of Florida.

THE STATE BANK OF ROME, a Corporation under the Laws of Georgia and Doing Business at Rome, Georgia, Plaintiff,

vs.

THE BANK OF JASPER, a Corporation under the Laws of Florida and Doing Business at Jasper, Florida, Defendant.

Know all men by these presents, that Hartford Accident and Indemnity Company, a corporation, is held and firmly bound unto The Bank of Jasper, a corporation, defendant in the above styled cause, in the penal sum of Five Hundred ($500.00) Dollars, for the payment whereof, well and truly to be made, it does hereby bind itself, its successors and assigns, firmly by these presents.

Signed and Sealed this 17th day of June, A. D. 1919.

The condition of the foregoing obligation is such that, whereas, the above named, The State Bank of Rome has sued out a writ of error from the judgment of the District Court of the United States in and for the Southern District of Florida, rendered on the 9th day of January, A. D. 1919, in a certain cause therein pending, wherein the above named The State Bank of Rome was plaintiff, and the said The Bank of Jasper, a corporation, was defendant, to the United States Circuit Court of Appeals for the Fifth Circuit, returnable before the said Court on the 23rd day of July, A. D. 1919; now
97 if the said The Bank of Rome shall prosecute the said writ of error to effect and answer all costs and damages, if they shall fail to make their plea good, then this obligation shall become null and void and else shall remain in full force and virtue.

[SEAL.] HARTFORD ACCIDENT AND INDEMNITY CO.,
A Corporation,
By H. F. FROMME,
Attorney in Fact.

Taken and approved by me this 23rd day of June, A. D. 1919.
RHYDON M. CALL,
Judge.

Indorsed: Bond for Costs, filed June 23, 1919. E. R. Williams, Clerk.

Citation.

76-3.

UNITED STATES OF AMERICA, *ss:*

The President of the United States to the Bank of Jasper, a corporation, Greeting:

You are hereby cited and admonished to be and appear at a Circuit Court of Appeals of the United States, to be holden at New Orleans, Louisiana, on the 23rd day of July, A. D. 1919, pursuant to a writ of error filed in the Clerk's office of the District Court of the United States, for the Southern District of Florida, wherein the State Bank of Rome, Georgia, a corporation, is Plaintiff in Error, against you, The Bank of Jasper, a corporation, Defendant in Error, to show cause, if any there be, why the judgment in said writ of error mentioned, entered on the 9th day of January, 1919, should not be corrected and speedy justice done to the parties
98 in this behalf.

Witness the Honorable Rhydon M. Call, Judge of the District Court of the United States for the Southern District of Florida, this 25th day of January, A. D. 1919.

RHYDON M. CALL,
[SEAL.] *Judge.*

Attest:
EDWIN R. WILLIAMS,
Clerk.

Indorsed: Citation. Filed June 23, 1919. E. R. Williams, clerk.

Affidavit of R. L. Frink.

United States District Court, Southern District of Florida.

THE STATE BANK OF ROME, GEORGIA, a Corporation, Plaintiff in Error,

vs.

THE BANK OF JASPER, a Corporation, Defendant in Error.

STATE OF FLORIDA,
County of Hamilton, ss:

Personally appeared before me, a Notary Public within and for the State of Florida at Large, one R. L. Frink, who being by me first duly sworn, deposes and says that he did on the 27th day of June, A. D. 1919, personally deliver a copy of the citation in the above styled cause to Thomas C. Watts the President of The Bank of Jasper, a corporation, in the above entitled cause.

R. L. FRINK.

Sworn to and subscribed before me on this 27th day of June, A. D. 1919.

J. A. JACKSON,
Notary Public.

[SEAL.]

99 Indorsed: Affidavit of R. L. Frink. Filed June 30, 1919. E. R. Williams, clerk.

In the District Court of the United States, Southern District of Florida.

THE STATE BANK OF ROME, a Corporation under the Laws of Georgia, Plaintiff in Error,

vs.

THE BANK OF JASPER, a Corporation under the Laws of Florida, Defendant in Error.

To the Clerk of the above-styled court:

In transmitting the record in the above entitled cause to the Clerk of the United States Circuit Court of appeals, you will please include in such record, and the same shall consist of each, severally, of the following:

1. Præcipe for summons filed January 27th, 1913.

2. Summons issued January 27th, 1913, together with the return thereon.

3. Appearance filed March 3rd, 1913.

4. Declaration filed March 3rd, 1913.

5. Stipulation and order of Court filed July 20th, 1914.

6. Additional pleas filed August 3rd, 1914.

7. Demurrer to additional pleas filed September 7th, 1914.

8. Defendant's joinder in demurrer filed September 30th, 1914. (Omit demurrer to additional replications contained in same cover with this joinder of issue.)

100 9. Order of Court filed January 12th, 1915.

10. Motion and Order of Court filed June 15th, 1915.

11. Replications filed June 15th, 1915.

12. Motion to strike and demurrer to replications filed July 5, 1915.

13. Order sustaining demurrer filed February 2nd, 1917.

14. Stipulation of Counsel filed January 9th, 1919.

15. Declination to plead further, filed January 9th, 1919.

16. Motion for final judgment and final judgment filed January 9, 1919.

17. Assignment of errors, filed May —, 1919.

18. Writ of Error, dated May —, 1919.

19. Bond for costs, filed May —, 1919.

20. Citation, dated May —, 1919.

22. Affidavit of R. L. Frink as to service of copy of citation and copy of writ of error upon the defendant in Error.

23. Directions to the Clerk, with affidavit of service thereof upon O. O. McCollum, Esq., Attorney for Defendant in Error.

24. You will please omit all other papers, pleadings, etc., from the record, for any and all other papers and pleadings are
101 irrelevant and immaterial to the assignment of errors.

W. E. KAY,
J. L. DOGGETT,
L. A. DEAN,
J. E. DEAN,
HENRY C. CLARK,
Attorneys for Plaintiff in Error.

To O. O. McCollum, Esq.,
Attorney for defendant in error:

You will please take notice of the above and foregoing directions to the Clerk.

W. E. KAY,
J. L. DOGGETT,
L. A. DEAN,
J. E. DEAN,
HENRY C. CLARK,
Attorneys for Plaintiff in Error.

STATE OF FLORIDA,
County of Duval, ss:

Personally appeared before me, a Notary Public within and for the State of Florida at large, one E. P. Owen, Jr., who being by me first duly sworn, deposes and says that on the 10th day of May, A. D. 1919, he did personally deliver a copy of the above and foregoing directions to the Clerk in the above-styled cause, personally to O. O. McCollum, Esquire, Attorney of Record for The Bank of Jasper.

E. P. OWEN, JR.

Sworn to and subscribed before me this 24th day of June, A. D. 1919.

ENNIS BOGGS,
[SEAL.] *Notary Public, State of Florida, at Large*

My commission expires 7th March, 1921.

Indorsed: Directions to clerk, filed June 24, 1919. E. R. Williams, clerk.

102 UNITED STATES OF AMERICA,
Southern District of Florida:

I, Edwin R. Williams, Clerk of the United States District Court in and for the Southern District of Florida and as such the legal custodian of the records and files of said Court, do hereby certify that the foregoing typewritten pages and part pages numbered from 1 to 108 inclusive, constitute a true and correct copy of the original record and proceedings including the assignment of errors in a cause lately pending in this Court wherein the State Bank of Rome, a corporation is plaintiff and the Bank of Jasper, a corporation is Defendant as prepared according to directions filed in said cause.

In witness whereof I have hereunto set my hand and affixed the seal of said Court at Jacksonville in said District, this 11th day of August, A. D. 1919.

EDWIN R. WILLIAMS,
[SEAL] *Clerk.*
By W. L. DEVORE,
Deputy Clerk

103 That thereafter the following proceedings were had in said cause in the United States Circuit Court of Appeals for the Fifth Circuit, viz:

Argument and Submission.

Extract from the Minutes of January 26, 1920.

No. 3432.

STATE BANK OF ROME

versus

THE BANK OF JASPER.

On this day this cause was called, and, after argument by Henry C. Clark, Esq., and W. E. Kay, Esq., for plaintiff in error, and Hilton S. Hampton, Esq., and F. P. Fleming, Esq., for defendant in error, was submitted to the Court.

Opinion of the Court.

Filed March 10th, 1920.

In the United States Circuit Court of Appeals, Fifth Circuit.

No. 3431.

First National Bank of Rome, Georgia, Plaintiff in Error,

versus

The Bank of Jasper, Defendant in Error.

Error to the District Court of the United States for the Southern District of Florida.

W. E. Kay, J. L. Doggett, L. A. Dean, J. E. Dean, and Henry Clark for Plaintiff in Error.
Hilton S. Hampton and F. P. Fleming for Defendant in Error.

No. 3432.

State Bank of Rome, Plaintiff in Error,

versus

The Bank of Jasper, Defendant in Error.

Error to the District Court of the United States for the Southern District of Florida.

W. E. Kay, J. L. Doggett, L. A. Dean, J. E. Dean, and Henry Clark for Plaintiff in Error.
Hilton S. Hampton and F. P. Fleming for Defendant in Error.

No. 3433.

State Bank of Rome, Georgia, Plaintiff in Error,

versus

First National Bank of Jasper, Florida, Defendant in Error.

Error to the District Court of the United States for the Southern District of Florida.

W. E. Kay, J. L. Doggett, L. A. Dean, J. E. Dean, and Henry C. Clark for Plaintiff in Error.
Hilton S. Hampton for Defendant in Error.

Before Walker, Circuit Judge, and Grubb and Jack, District Judges.

By the COURT:

The questions presented in these cases are substantially the same as those ruled on in the case of First National Bank of Rome, Georgia, vs. First National Bank of Jasper, Florida, MS. U. S. Circuit Court of Appeals, Fifth Circuit. Present Term. For reasons stated in the opinion rendered in the just cited case the judgment in each of the above numbered and entitled cases is

Reversed.

(Original filed March 10th, 1920.)

106 *Opinion of the Court.*

Filed March 10th, 1920.

In the United States Circuit Court of Appeals, Fifth Circuit.

No. 3430.

FIRST NATIONAL BANK OF ROME, GEORGIA, Plaintiff in Error,

versus

THE FIRST NATIONAL BANK OF JASPER, FLORIDA, Defendant in Error.

Error to the District Court of the United States for the Southern District of Florida.

W. E. Kay, J. L. Doggett, L. A. Dean, J. E. Dean, and Henry C. Clark for Plaintiff in Error.

Hilton S. Hampton, (S. S. Sandford and Hilton S. Hampton on the brief), for Defendant in Error.

Before Walker, Circuit Judge, and Grubb and Jack, District Judges.

GRUBB, *District Judge:*

This was a suit in the District Court upon a certificate of deposit brought by plaintiff in error as plaintiff against the defendant in error as defendant. Judgment for the defendant was based upon a plea that set up as a bar to the suit a decree of the Circuit Court of Hamilton County, Florida, in which one Corbett was plaintiff, and the parties to the present suit and others were defendants. The sufficiency of the plea as a bar to the present suit depends upon (1) its validity and (2) its effect.

107 (1) First as to its validity as against the plaintiff in this suit. At the time the Florida suit was brought the present

plaintiff was a non-resident of Florida, and was served by publication under a statute of Florida, permitting such service. The sufficiency of the constructive service was assailed by a motion of the then defendant to set aside or quash the service, which was overruled by the Circuit Court; from the order overruling the motion an interlocutory appeal was taken to the Supreme Court of Florida, which affirmed the order of the Circuit Court for reasons hereafter stated. It is settled that constructive service can only bring non-residents within the jurisdiction of a court where there is a res in the control of the Court in which the non-resident has an interest, and then only for the sole purpose of adjudicating his rights, if any, to the res. Pennoyer vs. Neff, 95 U. S. 714. This is the extent of the jurisdiction of a court to proceed upon substituted service, in the absence of personal service, or appearance. At the foundation of this limited jurisdiction based upon substituted service is the control of a res by the court asserting it. If there is no such res, the court acquires no jurisdiction for any purpose over the person of a non-resident, upon constructive service. The Circuit Court of Hamilton County, Florida, proceeded to final decree in the case of Corbett vs. First National Bank of Jasper and others upon the theory that there was a res, in which the non-residents were interested, in the control of that Court, and the Supreme Court of Florida on appeal took the same view, and sustained the constructive service upon the non-residents upon that idea. The supposed res was the proceeds of a note which the plaintiff Corbett had discounted at the Jasper Bank, for the purpose of paying for shares of the capital stock of the Rome Ins. Co., which he claimed to have been induced 108 by fraud to purchase. The proceeds of the note were paid to the trustee for the Insurance Company, and immediately deposited by him in the Jasper Bank, which issued its certificate of deposit therefor to the said trustee. The present suit is brought by the holder of the certificate of deposit. It is upon the theory that the proceeds of the note, so deposited in the Jasper Bank, created a specific fund in that bank, control of which could be and was acquired by the Hamilton County Circuit Court by order of that Court restraining its disposition, and thereby impounding it, that the two Florida Courts acted. The correctness of the theory is essential to the jurisdiction of the Florida Circuit Court, for if there was no fund there could be no jurisdiction acquired by substituted service. The proceeds of Corbett's note, when discounted, were paid to him by the Jasper Bank; and by him to the trustee for the Insurance Company, which deposited them in the Jasper Bank, taking the bank's obligation therefor in the form of its certificate of deposit. Undoubtedly the transaction was accomplished by bookkeeping entries, no money passing. In any event, the proceeds of Corbett's note never became a special deposit or fund, but were mingled with the Jasper Bank's monies indiscriminately when deposited, and the bank's general obligation substituted for the actual money. The certificate of deposit evidenced no particular fund or money, but the obligation of the bank to repay in like amount as

deposited out of any of its assets. There being no res in the control of the Circuit Court of Hamilton County, jurisdiction was not conferred on that court over the non-residents by substituted or constructive service. After the Supreme Court of Florida affirmed the appeal from the interlocutory order of the Circuit Court, sustaining the service, the non-residents made no further appearance or
109 answer, and the final decree, as to them, was one by default.

It is contended by defendant in error that the effect of appealing from the interlocutory order by the plaintiff in error, (defendant in the Corbett suit), was a general appearance on its part in that case, and conferred jurisdiction over its person on the Circuit Court on the remand of the case. The rule in Florida, differing from that which obtains in the Federal Courts, is to the effect that an appellant, though objecting to the sufficiency of service successfully, is considered in court upon the return of the case to the lower court. Conceding that this court will follow the rule of decision in the State Court, in passing upon a judgment in that court, we think the Florida rule did not apply in the Corbett case. The question of its applicability was suggested but not decided by the Supreme Court of Florida in its opinion in that case because the appellee asked that the appeal be decided on another ground. The Supreme Court held that "if the statute be followed, there is no right in the non-resident to quash this notice (by publication); he has the right if not waived, to object should the Court thereafter commit an error against him." The order of the Circuit Court was for that reason affirmed, apparently leaving the sufficiency and effect of the substituted service to be determined by the character of relief awarded against the non-residents upon final decree. The appeal was from an interlocutory order of the Circuit Court, which affected only the question of service. It was not an appeal from a final decree, upon which the insufficiency of service was assigned with other error, as in the cases cited supporting the Florida rule. The Florida statute allowing appeals from interlocutory orders was held by its Supreme Court in
110 the Corbett case to cover an order affecting service only. No other question than the rightful presence of the non-residents in the Circuit Court by virtue of the substituted service was presented by the appeal. If the rule contended for applies to such an interlocutory appeal, then the Florida legislature and its Supreme Court did a futile thing in providing a method of appealing from an order of the Circuit Court sustaining service, where the taking of the appeal itself by the party complaining of service alone puts the party in court as effectually as if properly served, and renders the appeal ineffectual for any purpose. We are not prepared to extend the rule in Florida as to the effect as an appearance of the taking of an appeal from a final decree, upon which error based on the insufficiency of service was relied upon with others, to an appeal from an interlocutory order, which involved only the question as to whether the appellant was rightfully in court, as in the Corbett case. Conceding that there is no authority in the practice of Florida for special appeals, an appeal from an interlocutory order, questioning the suf-

ficiency of service only, is authorized, and from this it is to be implied that an appellant is to derive some benefit from the appeal, which he could not do if the taking of the appeal constituted a general appearance on his part. It is not reasonably supposable that it was intended that the taking, as allowed by the statute, of an appeal from such an order as the one in question, should have the effect of depriving the appellant of the sole benefit sought to be obtained, or obtainable, by a resort to the remedy given. In the absence of authority from the Florida Supreme Court, applying the general rule to the case of such an interlocutory appeal, common sense requires us to decline to make the application. This contention is made by defendant in error, though there was a stipulation
111 in the State Court case, that the supersedeas should not constitute a general appearance.

(2) Aside from the question of jurisdiction acquired by service or appearance or both, and the validity of the decree as dependent thereon, is the question of the legal effect of the final degree rendered in the Corbett case.

We think that the decision of this case may be made to depend upon the effect to be given the decree of the Florida Circuit Court, as a defence to this suit. It is set up as a defence to a suit by the plaintiff in error to enforce a personal liability against the defendant in error upon a certificate of deposit. If the Florida decree was rendered with jurisdiction over the person of the plaintiff in error, and if its effect was to adjudicate that the defendant in error was not liable to plaintiff in error in a personal action upon the certificate of deposit, it would present a complete defence to the present suit. If either proposition fails to establishment, it presents no defence. We do not think that the Florida decree adjudicated the non-liability of the defendant in error to a personal judgment in favor of a holder of the certificate of deposit. The Supreme Court of Florida in the opinion in the case of Rome Insurance Company vs. Corbett, (based on this same transaction), said of the bill in that case:

"The Bill confines its prayer to an adjudication of the fund sought to be impounded, and does not pray for a general personal decree against these non-residents, and we are not to assume upon the face of the Bill that the Circuit Court will enter an unauthorized decree, and we have not before us any such question of jurisdiction as was involved in the case of Pennoyer vs. Neff, 95 U. S. 714. * * * We are not to be understood as holding that the Court might not quash a service by publication, if the Bill upon its face showed that it was clearly a common law action, and that the resort to the equity side of the court was a mere subterfuge."

The Supreme Court of Florida construed the bill as asking relief only out of a fund supposed to be in the Jasper Bank, and held that that was the only character of relief that was grant-
112 able as against the non-resident defendants upon constructive service. The Court said that it contained no prayer for a general personal decree, and that such a decree would be unauthorized

and in conflict with the doctrine of Pennoyer vs. Neff. This was a direction to the lower court to restrict whatever decree it might render against non-residents upon constructive service to an adjudication of their rights in the fund, which was supposed to be in the possession of the defendant in error, the Jasper Bank. The Supreme Court reserved "his right, if not waived, to object should the Court thereafter commit an error against him." The fact that there was no such fund in existence, and that only the personal liability of the defendant in error on the certificate of deposit was in question, is immaterial. The Circuit Court of Hamilton County and the Supreme Court of Florida both entertained the view that the proceeds of the notes discounted, when deposited in the Jasper Bank to the credit of the Trustee of the Rome Insurance Company created a fund, which was evidenced by the certificate of deposit, and which conferred jurisdiction on the Circuit Court over the non-residents, but only to the extent of their interest in the supposed fund. It will be presumed that the subsequent final decree of the Hamilton County Circuit Court was restricted as directed by the Supreme Court. A reference to its terms makes this certain. It adjudged the agreement between Corbett and the Rome Insurance Company and its Trustee for the sale of its capital stock void and of no effect; that the proceeds of the note of Corbett, covered by the certificate of deposit be impressed with a trust in favor of Corbett and be decreed to belong to him; that the Trustee for the Rome Insurance Company be adjudged to have no interest in the proceeds of the note and that defendant in error be required to pay such proceeds to Cor-
113 bett and enjoined from paying them to the Trustee or any one for it; that the certificate of deposit in so far as it covers and includes the proceeds derived from the said note be decreed void and of no effect. It is clear that the decree adjudged only the rights of the non-residents in and to the supposed fund in the Jasper Bank and did not attempt to adjudge that the Jasper Bank was not personally liable to the non-resident holders of the certificates of deposit. Under the doctrine of Pennoyer vs. Neff, recognized and referred to in the opinion of the Supreme Court of Florida, it could not have done so. The decree went as far as it could go, in denying the non-residents the right to participate in the supposed, but actually non-existent, fund in the Jasper Bank.

The defendant in error set up the decree as a defence to a common law action brought by a non-resident holder of the certificate of deposit against the Jasper Bank, seeking to subject it to a judgment upon the theory of its personal liability by reason of its having executed the certificate of deposit which was in legal effect a due bill and imported the personal liability of the maker, as much as would a promissory note. A decree which had the sole effect of adjudging that the plaintiff had no rights in a special fund, whether existent or not, could not bar the right of the plaintiff to try out in the common law action the personal liability of the bank that issued the certificate. If the Jasper Bank was personally liable to the holder of the certificate, the holder was entitled to pursue it to judgment and collect the judgment out of its assets, other than the

fund. The decree was therefore no defence to the action, and this would result, even though the Hamilton County Circuit Court had obtained jurisdiction, by service of appearance, to render a personal decree against the non-resident, since the decree actually
114 rendered and here interposed as a defence, is not such a decree.

We think the decree presented no defence to the action (1) because the Florida Court had no jurisdiction to render it as to the non-residents, and (2) because it did not purport to determine the personal liability of the defendant in error to the plaintiff in error on the certificate of deposit. The decree is reversed and the cause remanded for further proceedings in conformity to this opinion.

Reversed.

JACK, *District Judge:*

On the ground that the Circuit Court of Hamilton County, Florida, was without jurisdiction in the Corbett case, I concur in the decree.

(Original filed March 10th, 1920.)

115 *Judgment.*

Extract from the Minutes of March 10th, 1920.

No. 3432.

THE STATE BANK OF ROME

versus

THE BANK OF JASPER.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Southern District of Florida, and was argued by counsel;

On consideration whereof, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this cause, be, and the same is hereby, reversed; and that this cause be, and it is hereby remanded to the said District Court for further proceedings in conformity to the opinion of this Court;

It is further ordered and adjudged that the defendant in error, The Bank of Jasper, be condemned to pay the costs of this cause in this Court, for which execution may be issued out of the said District Court.

116 *Clerk's Certificate.*

UNITED STATES OF AMERICA:

United States Circuit Court of Appeals, Fifth Circuit.

I, Frank H. Mortimer, Clerk of the United States Circuit Court of Appeals for the Fifth Circuit, do hereby certify that the pages numbered from 103 to 115 next preceding this certificate contain full, true and complete copies of all the pleadings, record entries and proceedings, including the opinion of the United States Circuit Court of Appeals for the Fifth Circuit, in a certain cause in said Court, numbered 3432, wherein the State Bank of Rome is plaintiff in error and The Bank of Jasper is defendant in error, as full, true and complete as the originals of the same now remain in my office.

I further certify that the pages of the printed record numbered from 1 to 102 are identical with the printed record upon which said cause was heard and decided in the said Circuit Court of Appeals.

In testimony whereof I hereunto subscribe my name and affix the seal of the said Circuit Court of Appeals, at my office in the City of New Orleans, Louisiana, in the Fifth Circuit, this 10th day of April, A. D. 1920.

[Seal United States Circuit Court of Appeals, Fifth Circuit.]

FRANK H. MORTIMER,
Clerk of the United States Circuit Court of Appeals, Fifth Circuit.

117 In the United States Circuit Court of Appeals, Fifth Circuit.

No. 3432.

THE STATE BANK OF ROME, Plaintiff in Error,

versus

THE BANK OF JASPER, Defendant in Error.

I, Frank H. Mortimer, Clerk of the United States Circuit Court of Appeals for the Fifth Circuit, do hereby certify that the transcript of the record of the proceedings of this Court in the within entitled case heretofore certified by me for filing in the Supreme Court of the United States was correct and complete as the same then appeared in this Court.

In pursuance of the command of the annexed writ of certiorari I now hereby certify that on the 26th day of October, A. D. 1920, there was filed in my office a stipulation in the above entitled case in the following words, to-wit:

In the United States Circuit Court of Appeals in and for the Fifth Circuit.

#3432.

THE STATE BANK OF ROME, Plaintiff in Error,

vs.

THE BANK OF JASPER, Defendant in Error.

Stipulation.

Whereas, the United States Supreme Court, by a writ of certiorari sued on the 15th day of October, A. D. 1920, commanded the dges of the above Court to send to said United States Supreme urt without delay, the record and proceedings in the above en- ed cause, and

Whereas, there is now on file and of record in said United States preme Court a certified transcript of the record and proceedings the above entitled cause,

Now therefore, it is stipulated and agreed by and between coun- sel for the respective parties hereto that the said certified s copy of the transcript and proceedings of the above cause now on file and of record in the United States Supreme urt may be taken and considered by said United States Supreme urt as a sufficient compliance with and return to said writ.

Dated this 20th day of October, A. D. 1920.

(Signed) W. E. KAY,
J. L. DOGGETT,
HENRY C. CLARK,
Attorneys and of Counsel for the State Bank of Rome, Plaintiff in Error.

(Signed) F. P. FLEMING,
Attorney and of Counsel for The Bank of Jasper, Defendant in Error."

I further certify that the above is a true and correct copy of said pulation and of the whole thereof.

In testimony whereof, I hereunto subscribe my name and affix seal of said United States Circuit Court of Appeals, at the City New Orleans, Louisiana, this 26th day of October, A. D. 1919.

[Seal United States Circuit Court of Appeals, Fifth Circuit.]

FRANK H. MORTIMER,
Clerk of the United States Circuit Court of Appeals for the Fifth Circuit.

119 UNITED STATES OF AMERICA, *ss:*

[Seal of the Supreme Court of the United States.]

The President of the United States of America to the Honorable the Judges of the United States Circuit Court of Appeals for the Fifth Circuit, Greeting:

Being informed that there is now pending before you a suit in which The State Bank of Rome is plaintiff in error, and The Bank of Jasper is defendant in error, No. 3432, which suit was removed into the said Circuit Court of Appeals by virtue of a writ of error to the District Court of the United States for the Southern District of Florida, and we, being willing for certain reasons that the said cause and the record and proceedings therein should be certified by the said Circuit Court of Appeals and removed into the Su-
120 preme Court of the United States, do hereby command you that you send without delay to the said Supreme Court, as aforesaid, the record and proceedings in said cause, so that the said Supreme Court may act thereon as of right and according to law ought to be done.

Witness the Honorable Edward D. White, Chief Justice of the United States, the fifteenth day of October in the year of our Lord one thousand nine hundred and twenty.

JAMES D. MAHER,
Clerk of the Supreme Court of the United States.

[Endorsed:] File No. 27,741. Supreme Court of the United States, October Term, 1920. No. 384. The Bank of Jasper vs The State Bank of Rome, Georgia. Writ of Certiorari. 3432. Filed 26th day of October, 1920. Frank H. Mortimer, Clerk of the United States Circuit Court of Appeals.

121 [Endorsed:] 384—27741. No. 3432. United States Circuit Court of Appeals for the Fifth Circuit. The State Bank of Rome, plaintiff in error, vs. The Bank of Jasper, defendant in error. Writ of certiorari and return thereto.

122 [Endorsed:] File No. 27,741. Supreme Court U. S., October Term, 1920. Term No. 384. The Bank of Jasper, petitioner, vs. The State Bank of Rome, Ga. Writ of certiorari and return. Filed Oct. 29, 1920.

Office Supreme Court, U. S.
FILED
JAN 9 1922
WM. R. STANSBURY
CLERK

FILE NO. 27,740

IN THE

Supreme Court of the United States

October Term, 1921

No. 76

THE BANK OF JASPER,
A CORPORATION,

Petitioner,

vs.

FIRST NATIONAL BANK OF ROME,
GEORGIA, A CORPORATION,

Respondent.

Chronological Index to Record, Showing Intermingling of Litigation in State and Federal Courts

W. E. KAY,
J. L. DOGGETT,
L. A. DEAN,
HENRY C. CLARK,
Attorneys and Counsel for Respondent.

FILE NO. 27,740

IN THE

Supreme Court of the United States

October Term, 1921

No. 76

THE BANK OF JASPER,
A CORPORATION,

Petitioner,

vs.

FIRST NATIONAL BANK OF ROME,
GEORGIA, A CORPORATION,

Respondent.

Chronological Index to Record, Showing Intermingling of Litigation in State and Federal Courts

W. E. KAY,
J. L. DOGGETT,
L. A. DEAN,
HENRY C. CLARK,
Attorneys and Counsel for Respondent.

IN THE

Supreme Court of the United States

THE BANK OF JASPER, A CORPORATION, *Petitioner.*		October Term, 1921
VERSUS		
FIRST NATIONAL BANK OF ROME, GEORGIA, A CORPORATION. *Respondent.*		No. 76.

CHRONOLOGICAL INDEX TO RECORD SHOWING INTERMINGLING OF LITIGATION IN STATE AND FEDERAL COURTS

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The State Court Final Decree in the Chancery Suit instituted by J. H. Corbett is found at page 21 of the record in case No. 74, October term 1921 of the Supreme Court of the United States.

The above is respectfully submitted for the convenience of the Court.

W. E. KAY,
J. L. DOGGETT,
L. A. DEAN,
HENRY C. CLARK,
Attorneys and Counsel for Respondent.

FILED
JUN 1 1920
JAMES D. MAHER,
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1919.

No. 874

FIRST NATIONAL BANK OF JASPER, FLORIDA,
a Corporation, Petitioner,

vs.

THE FIRST NATIONAL BANK OF ROME,
a Corporation, Respondent.

PETITION FOR WRIT OF CERTIORARI.

To the
UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE FIFTH CIRCUIT.

WILLIAM WADE HAMPTON,
Attorney for Petitioner,
Gainesville, Fla.

HILTON S. HAMPTON
AND S. S. SANFORD,
Of Counsel,
Tampa, Fla.

In the Supreme Court of the United States

OCTOBER TERM, 1919.

No.....

FIRST NATIONAL BANK OF JASPER, FLORIDA,
a Corporation, Petitioner,

vs.

THE FIRST NATIONAL BANK OF ROME,
a Corporation, Respondent.

PETITION FOR WRIT OF CERTIORARI.

To the

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE FIFTH CIRCUIT.

WILLIAM WADE HAMPTON,
Attorney for Petitioner,
Gainesville, Fla.

HILTON S. HAMPTON
AND S. S. SANFORD,
Of Counsel,
Tampa, Fla.

NOTICE TO COUNSEL

To Messrs. William E. Kay, John L. Doggett, L. A. Dean, I. E. Dean and Henry C. Clark, Counsel of Record in the Circuit Court of Appeals for the Respondent herein:

Please take notice that on Monday, the 4 day of October, A. D. 1920, at the opening of court on that day, or as soon thereafter as petitioner may be heard, we shall submit to the Supreme Court of the United States, at its court room in the Capitol in the city of Washington, the following petition for a writ of certiorari in the case there entitled together with the brief in support thereof accompanying the same.

Dated at Tampa, Florida, this 28 day of August, 1920.

WM. WADE HAMPTON,
Attorney for Petitioner.

Service of the foregoing notice, together with a copy of the accompanying petition and brief, is hereby accepted.

.....
Of Counsel for Respondent.

IN THE SUPREME COURT OF THE
UNITED STATES.

OCTOBER TERM, 1919.

No.....

FIRST NATIONAL BANK OF JASPER, FLORIDA,
a Corporation, Petitioner,

vs.

THE FIRST NATIONAL BANK OF ROME,
a Corporation, Respondent.

PETITION FOR WRIT OF CERTIORARI.

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States

The petition of The First National Bank of Jasper, Florida, a corporation, respectfully shows unto this Honorable Court as follows:

FIRST: This cause involves a conflict between the Supreme Court of the State of Florida and the United States Circuit Court of Appeals in and for the Fifth Circuit.

SECOND: This cause was instituted against your petitioner in the United States District Court in and for the Southern District of Florida on the 27th day of January, A. D. 1913, by the respondent herein, seeking to recover on certain certificates of deposit issued by your petitioner (Transcript p. 1). The jurisdiction of the trial court was based on diversity of citizenship. (Transcript p. 3).

THIRD: Prior to the institution of this action in the United States District Court as aforesaid on to-wit the 3rd day of January, A. D. 1913, there were filed in the Circuit Court in and for Hamilton County, Florida, a court of general jurisdiction, bills of complaint by J. H. Corbitt and others, in separate suits, against Rome Insurance Company, American Bank and Trust Company, and First National Bank of Rome, Georgia, and against your petitioner, (Transcript p. 70); that in and by said bills of complaint it was prayed that certain certificates of deposit (being the same certificates of deposit sued on in this cause) be declared to be null and void, and that your petitioner be restrained from paying the proceeds thereof to respondent in this cause, or any one for it (Transcript p. 77); that said certificates of deposit (Transcript p. 8) are identical in all respects save the numbers thereof and the amounts vary, and the names of the persons depositing the proceeds of same, said certificates being in words and figures following, to-wit:

CERTIFICATE OF DEPOSIT.

No. 895.

Jasper, Fla., Nov. 25, 1911.

THE FIRST NATIONAL BANK, JASPER, FLA.

This certifies that.....has deposited in this Bank.....Dollars, payable to the order of American Bank and Trust Co.,

Trustee, Rome, Ga. in current funds on return of this certificate properly endorsed with interest at four per cent per annum (not over.....Dollars)). No interest paid for fraction of a month. Not payable until Nov.....1912.

C. GILBERT, Cashier.

$.....

$.....

That in said suits in the said circuit court in and for Hamilton County, Florida, service of process was had upon Respondent (the original plaintiff herein) by publication, under the provisions of Section 1866 General Statutes of Florida and Chap. 5913 Laws of Florida 1909 (Transcript p. 66); that your petitioner, a resident of the State of Florida, was personally served with process.

That upon the return day fixed in the order of publication of process, Respondent (Original plaintiff herein) filed special appearances and motions to quash the service (Transcript p. 52) which motions were in substance confined to the one ground that the proceedings brought in the state court were actions *in personam* and that there had been no personal service on said Respondent. These motions having come on to be heard before the Circuit Court of Hamilton County, Florida, said court on the 3rd day of April, A. D. 1913, did deny said motions.

Thereupon, on the 10th day of April, A. D. 1913, stipulations were entered into between solicitors for the respective parties in the suits in the State court (Transcript p. 102) providing that all proceedings in said suits be stayed pending the prosecution of an appeal to the Supreme Court of Florida in the case of J. H. Corbitt vs Rome Insurance Company, et als., which appeal was from orders of the State court denying similar motions to quash service by publication on similar grounds, and which appeal under the decisions of the Supreme Court of Florida constituted a general appear-

ance by the appellant (Respondents herein); and it was further provided in and by said stipulation (Transcript p. 102) that the ultimate decision of the said appeal in said case of J. H. Corbitt vs Rome Insurance Company, et als., would be decisive of the validity of the service by publication on the defendants in those suits.

That at the June term of the Supreme Court of Florida, said Supreme Court affirmed the order of the lower court in the case of J. H. Corbitt vs Rome Insurance Company, et als., (Transcript p. 96) in words and figures a sfollows, to-wit:

"In the Supreme Court of Florida,
June Term, A. D. 1913.

"Rome Insurance Company, a Georgia Corporation, and other Appellants,
vs.
J. H. Corbitt, Appellee.
Hamilton County.

COCKREL, J.:

"A bill was filed in the Circuit Court for Hamilton County against local defendants and also certain non-residents corporations seeking to impound a fund in that county arising out of an alleged fraudulent transaction consummated in that county. Constructive service, in perfect accordance with the statute was had by publication, and the non-residents corporations appeared specially to quash the service upon the theory that the sole relief prayed was *in personam*, and that therefore the statute authorizing constructive service by publication does not apply. This motion having been denied these non-residents have sued out what they term a special appeal.

"It may well be that this appeal so operates as a general appearance in the circuit court as to render the question before us a moot one, but the Appellee does not ask us to so hold, and it appears that this is but a test case, upon the decision of which many other cases in that court are depending.

"The bill confined its prayer to an adjudication of the funds sought to be impounded, and does not pray for a general personal decree against these non-residents

and we are not to assume from the face of the bill that the Circuit Court will enter an unauthorized decree; and we have not before us any such question of jurisdiction as was involved in the case of Pennoyer vs Neff, 95 U. S., 714.

82. "The purpose of the statute authorizing constructive service by publication is to notify non-residents of the pending suit so that they may, if they care to do so, come into the case and if the statute be followed, there is no right in the non-resident to quash this notice; he has his right if not waived to object should the court thereafter commit an error against him.

"Our constructive service statute is broad enough to apply to any suit in equity pending in our Circuit Court, and as has been said in Kilpatrick vs Post, 53 N. J. Eq., 591 text 597 32 Atl. Rep. 267, cannot be confined in its operation to the cases where the court might make final decree or judgment. Further that Court says: 'It was not intended that the question of the power to enter the ultimate decree or judgment should enter into the question of the right to give notice of the suit to a non-resident, or that this question of jurisdiction should be settled on a motion to discharge the order of publication. The complainant is entitled to have the question of jurisdiction settled by a final decree.'

"We are not to be understood as holding that the court might not quash a service by publication, if the bill upon its face showed that it was clearly a common law cause of action, and that the resort to the equity side of the court was a subterfuge; the bill before us does not present that case."

"The Order is affirmed:

"Shackleford, C. J. and Taylor, Hocker and Whitfield, J. J. concur."

That thereafter Respondent herein took no further part in the proceedings in the State Court (Transcript p. 29) and on the 14th day of July, A. D. 1914, final decrees were entered in the state court (Transcript p 29) which decrees adjudged that the certificates of deposits therein mentioned (being the same certificates of deposit herein sued upon) were void and of no effect

and enjoining your petitioner from paying the proceeds thereof to Respondent herein or to any one for it; that said decrees and each of them are still of full force and effect.

FOURTH: That on the 3rd day of August, A. D. 1914, in this suit instituted in the United States District Court in and for the Southern District of Florida by Respondent herein against your petitioner, your petitioner did file pleas of *res adjudicata,* (Transcript p. 10) setting up the decrees entered in the Circuit Court in and for Hamilton County, Florida, which decrees adjudged the certificates of deposit herein sued upon to be void and of no effect, and which enjoined your petitioner from paying the proceeds thereof to the plaintiff below (Respondent herein) or to any one for it. Certified copies of said decrees were attached to said pleas (Transcript p. 29).

FIFTH: That on the 7th day of September, A. D. 1914, the plaintiff in the trial court, Respondent herein, filed a demurrer to said pleas (Transcript p. 38) which said demurrer coming on to be heard before the District Judge of said Court, was on the 12th day of January, A. D. 1915, over-ruled, (Transcript p. 41).

SIXTH: That thereafter, on the 15th day of June, A. D. 1915, said Respondent filed replications to said pleas, (Transcript p. 47) setting up in substance by said replications that the chancery suits mentioned in your petitioner's pleas, and which are fully described in the third paragraph of this petition, were action *in personam;* that no personal service was ever had on said Respondent herein; that it did not at any time or any manner appear in said suits, except specially, to contest the service by publication therein made, and that it in no way waived the want of jurisdiction of the State court over its person; there were attached to said replication copies of the records in the said Chancery suits mentioned, (Transcript p. 57 to 115).

SEVENTH: That on the 5th day of July, A. D. 1915, your petitioner filed a motion to strike (Transcript p. 108) and a demurrer (Transcript p. 109) to said replications which said motion and demurrer coming on to be heard by the Court, the said demurrer was, on the 2nd day of February, A. D. 1917, sustained as to each of said replications (Transcript p. 115).

EIGHTH: That on the 9th day of January, A. D. 1919, the plaintiff in the trial court filed a declination to plead further (Transcript p. 117). Thereupon on the 9th day of January, A. D. 1919, final judgment was entered in favor of your petitioner (Transcript p. 119).

NINTH: That from said judgment said Respondent sued out a writ of error to the Circuit Court of Appeals of the United States for the Fifth Circuit which court on the 10th day of March, A. D. 1920, reversed the judgment of the District Court, holding in effect:

(a) That the Circuit Court in and for Hamilton County, Florida, acquired no jurisdiction over the person of respondent herein, by the service by publication made in said suits.

(b) That said Circuit Court in and for Hamilton County, Florida, acquired no jurisdiction over the fund or *res* sought to be impounded in said chancery suits, as the same was not under the control of the Court.

(c) That the Florida Court had no jurisdiction to render the said decrees as to non-residents.

(d) That the said court did not purport to determine the personal liability of your petitioner to the plaintiff on the said certificates of deposit.

(e) That the prosecution of the appeals by the respondent herein to the Florida Supreme Court, did not amount to general appearances in the State Court of Florida and this holding is in conflict with the decision of the Supreme Court of Florida.

TENTH: That a certified copy of the entire record in this cause in the Circuit Court of Appeals of the United States for the Fifth Circuit is hereby furnished, attached hereto and made a part of this petition, and marked Exhibit "A," all in compliance with Rule 37 of this Honorable Court.

ELEVENTH: Your petitioner is advised and believes that the aforesaid judgment of the United States Circuit Court of Appeals for the Fifth Circuit is erroneous, and that this honorable court should require the said case to be certified to it for its review and determination, in conformity with the provisions of the Act of Congress in such case made and provided, said case being final in said United States Circuit Court of Appeals by the provisions contained in Section 128 of the United States Judicial Code.

TWELFTH: Your petitioner further represents unto this Honorable Court that the aforesaid judgment of the United States Circuit Court of Appeals for the Fifth Circuit presents a conflict of State and Federal jurisdiction and in effect reverses the decisions of the Supreme Court of the State of Florida in the cases of Rome Insurance Company, et als., vs B. F. Carter (63 Sou. 834) and Rome Insurance Company et als. vs J. H. Corbitt, (63 Fla. 833) and denies them full faith and credit, for the following reasons:

(a) The United States Circuit Court of Appeals held that the prosecutions of the appeals in the State Court did not amount to general appearances, whereas the Florida Supreme Court, following the established rule of practice in that State, held that the prosecution of an appeal constitutes a general appearance in the lower court.

(b) The Florida Supreme Court held that the service of publication upon Respondent herein original plaintiff in this action, was valid so as to bring its person within the jurisdiction of the court for the relief

prayed in the bills of complaint. The Circuit Court of Appeals held otherwise.

(c) The Florida Supreme Court held that the bills of complaint confined their prayers to an adjudication of a fund sought to be impounded, and that said fund was within the jurisdiction and control of the State Court; the said Circuit Court of Appeals by its decree in effect denies this.

THIRTEENTH: Your petitioner further represents that said judgment of the United States Circuit Court of Appeals for the Fifth Circuit is erroneous on the following grounds:

(a) The fund impounded by the decrees in the State Court had its *situs* in the State of Florida, and not in the State of Georgia;
because:

(aa) The money was not to be payable except "on the return of this certificate properly endorsed."

(bb) The certificate was not subject to check.

(cc) The deposit was made for a specific purpose and was not the part of a general fund.

(dd) The *situs* of a debt, for the purpose of administration and garnishment, is the home of the debtor.

(b) The proceedings in the State Court, the decrees in which were set up as a defense by your petitioner in the District Court, were proceedings *in rem*, to the validity of which personal service is unnecessary.

(c) If any defects existed in the State Court's jurisdiction over Respondent, such defects, under the rulings of the Supreme Court of Florida, were waived by the prosecution of the appeal to the Florida Supreme Court.

FOURTEENTH: Your petitioner further represents that no question was raised by the plaintiff, either in the District Court or in the Circuit Court of Appeals as to the sufficiency of your petitioner's pleas of *res adjudicata*, except that the proceedings in the State Court were actions *in personam* and that no personal service was had on the plaintiff, one of the defendants in those proceedings.

FIFTEENTH: Your petitioner further represents that the said United States Circuit Court of Appeals for the Fifth Circuit in denying to your petitioner the benefit of the adjudication of the Supreme Court of Florida of a statute of that state, assumed a jurisdiction which not even the Supreme Court of the United States has power to assume.

WHEREFORE, your petitioner respectfully prays that a writ of certiorari may be issued out of and under the seal of this Court, directed to the United States Circuit Court of Appeals in and for the Fifth Circuit, commanding the said court to certify and send to this Court, on a day certain therein to be designated, a full and complete transcript of the record and all proceedings of the said cause against said respondent, to the end that the said case may be reviewed and determined by this court, as provided in and by Section 240 of the United States Judicial Code, or that your petitioner may have such other or further relief or remedy in the premises as to this Court may seem appropriate and in conformity with said provision of the Judicial Code, and that the said judgment of said Circuit Court of Appeals in said case, and every part thereof, may be reversed by this Honorable Court.

And petitioner will ever pray, etc.

Tom Wade Hamilton

Attorney and Counsel for Petitioner.

IN THE

SUPREME COURT OF THE UNITED STATES

THE FIRST NATIONAL BANK OF JASPER, FLORIDA,
Petitioner

vs.

FIRST NATIONAL BANK OF ROME, GEORGIA,
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE UNITED STATES FOR FIFTH CIRCUIT

BRIEF OF PETITIONER, FIRST NATIONAL BANK OF JASPER, FLORIDA.

STATEMENT

The foregoing is a cause originating in the District Court of the United States for the Southern District of Florida, wherein First National Bank of Rome, Georgia, was plaintiff, and petitioner was defendant, a judgment on demurrer, upon over-ruling demurrer to plea of *res adjudicata* in said cause by the District Court was made the basis of a writ of error to the said Circuit Court of Appeals.

The decision of the appellate court, reversing the decision of the district court is made the basis of the petition for certiorari, in the instant case, as the defendant in error under the Constitution and Statutes of the

United States is not entitled to have its cause presented to this honorable court by appellate proceedings, the decision of the said Circuit Court Appeals being final.

ARGUMENT

The court will observe by reference to the transcript of the record that the basis for the plaintiff's action in the lower court was a certificate of deposit placed in petitioner's bank on November 22, 1911 (transcript p. 9). This certificate of deposit was sought to be invested with a trust on behalf of certain claimants thereto, and process by publication was regularly had, upon the plaintiff in error, under a statute of Florida which the Supreme Court of Florida has held "is broad enough to apply to any suit in equity pending in our circuit court," the suit in which the Bank deposit was sought to be invested with a trust was begun and prosecuted in the Circuit Court of Hamilton County, Fla.

Section 1866, General Statutes of Florida (Chap. 5383 (Laws of Florida), A. D. 1905.

Chapter 5913, Laws of Florida, 1909.

Such statutes have uniformly been held to be constitutional in all cases where the status of a *person* or *res* within the jurisdiction of the court is sought to be determined.

> Loaiza vs Sup. Ct. 9 L. R. A. 377.
> Pennoyer vs Neff 95 U. S. 714.
> Boswell's Lessee vs Otis, et al, U. S. 13 Law Ed. p. 165.
> Black on Judgments, Vol. 2, Sec. 793.
> Gillon vs Wear, 28 S. W., 1014.
> Arndt vs Griggs, 134 U. S., 316.
> Hamilton vs Lewis, 161 U. S. 256.

The plaintiff in error appeared before the Circuit Court for Hamilton County, Florida, attacked the constructive service upon the sole ground that the fund

could not be impressed with a trust without personal service and that no personal service was had upon the plaintiff in error.

The decision of said court was adverse to this contention whereupon the plaintiff in error from such decision appealed to the Supreme Court of Florida. In said last named court the decision of the lower court was upheld, the Supreme Court of Florida holding in effect:

(a) That the foregoing statutes providing for constructive service are broad enough to apply to the present litigation, and that service by publication under said statutes invested the lower with jurisdiction over the *res* so as to enable said court to enter a decree determining its ownership.

(b) That the appearance of the plaintiff in error by suing out an appeal from the decision of the lower court, and becoming an actor therein invested the Florida courts with jurisdiction of its person.

Rome Ins. Co. vs Corbett, 66 Fla., 138, 63 Son 833.

This judgment is, therefore, binding upon the Federal Court because it is the judgment of a court of record of general jurisdiction, and the question of jurisdiction, involving as it does, a principle of practice of the state courts, is binding and conclusive upon the Federal courts, and cannot be collaterally impeached, reviewed, or re-examined, as touching the merits of the original controversy.

Black on Judgments, Vol. 1, Sec. 270.
Ency of Law, Vol. 23, p. 1596.
Hubbard vs American Investment Co., 70 Fed., 808.
Sipe vs Coprell, 59 Federal, 970.
Colt vs Colt, 111 U. S., 556.
Duncan vs Gegan, 101 U. S., 810.

In the absence of a Federal question, the decision of a state court upon the determination of its jurisdiction

involving the construction of a statute of that state is binding and conclusive upon the Federal courts.

> Fallbrook Irrigation District vs Bradley, 164 U. S., 112.
> See also 101 U. S., 551.
> Terry vs Davis, 107 Fed., 50.

One who has voluntarily sought the judgment of the Supreme Court of a state to declare that a decree of a lower court was not only erroneous but void, although not a voluntary litigant in the trial court, is bound by the judgment of the Supreme Court, as *res judicata* and cannot attack it collaterally in a circuit court of the United States.

> Forsyth vs City of Hammond, 166 U. S., 501.

If the question of jurisdiction depends on some local statute, and it is presented to and decided by the court rendering the judgment, such decision is binding on the Federal Courts.

> See Colt vs Colt, 112 U. S., 566.
> Duncan vs Gegan, 101 U. S., 810.

That the bringing of an action upon the certificate of deposit in the U. S. District Court, under the decision of the state court in Rome Insurance Company, *supra*, is a collateral attack upon the state court judgment.

> See Supervisors vs United States, 4 Wall., 435.
> Harris vs Hardeman, 14 How., 334.

Under the decision of the Supreme Court of Florida in Rome Insurance Company vs Corbett, *supra*, the transcript showed that the plaintiff in error took no further proceeding in the state court,—permitting the cause to go to a final judgment, and this judgment is made the basis of the plea of *res adjudicata* filed in the

District Court by the petitioner (Transcript p.....). This decree has never been reversed, nor has any appeal been prosecuted therefrom to the Supreme Court of Florida, and it is therefore of full force and effect.

> Central Trust Company vs. Seasongood, 130 U. S., 32.

Counsel for plaintiff in error have argued that the decision of the Florida court cannot be made the basis of *res adjudicata* for the reason that equity acts *in personam*, and that the instant case, lacking as it does the essentials of an action *in rem* strictly considered is in effect merely a determination of the personal rights and obligations of the parties, therefore it cannot be made the basis of a decree *in rem* upon constructive service.

Unfortunately for this contention, this honorable court has held to the contrary, and the record in this case shows with respect to the certificate:

(a) That the money was not to be payable except on "return of this certificate properly endorsed."

(b) That the money was not to be removed from the bank of the petitioner under any circumstances until after November 22, 1912, nearly one year from date of deposit.

(c) That the certificate was not subject to check.

(d) That the decree of the lower court, which appears in the record (Transcript p.....) does not attempt to go further than investing the fund situate in the bank of your petitioner with a trust, and imposes no personal duty or obligation upon either of the parties.

(e) That the fund in part consisted of notes of citizens of Florida, payable in Florida.

A reference to the decisions of this court will show that where the decree confines itself to an adjudication of title to a fund before the court, it is a proceeding *quasi in rem*.

"The state has jurisdiction over property within its limits owned by non-residents, and may, therefore, subject it to payment of demands against them of its own citizens."

Freeman vs Alderson, 119 U. S., 373.
Black on Judgments, 2d Ed., Vol. 2, Sec. 793.
Arndt vs Griggs, 134 U. S., 316.
Bennett vs. Fenton, 10 L. R. A., 500.
Hamilton vs Lewis, 151 U. S., 256.
Gillon vs Wear, 28 S. W., 1014.
Hardy vs Beatty, 19 S. W., 778.
Palmer vs McCormick, 30 Fed., 82.
Purdy vs Wallace, 81 Fed., 515.
Story's Equitable Jurisprudence, 14 Ed., Sec. 93.

That the principle applies a *fortiori* where personal property involved, see an able decision by Judge Shiras, in

Loaizi vs Supreme Ct., 9 L. R. A., 377.

Under the Florida practice, appeals are allowed from interlocutory as well as final decrees.

That an appeal from a decree is an appearance vesting the court with jurisdiction over the person of appellant, see

Drew Lbr. Co. vs Walter, 45 Fla., 252; 34 Sou. Rep. 244.
Barwick vs Rouse, 43 Sou. Rep., 753.
Hayman vs Weil, 44 Sou. Rep., 176.
Rumeli vs City of Tampa, 48 Fla., 112; 37 Sou. Rep. 563.
Wilson vs Brandenburg, 16 Ark., 646.
Wylly vs Sanford, L. & T. Co., 44 Fla., 818; 33 Sou. 453.
Bustamente vs Bescher, 43 Miss., 172.
Taylor vs Sledge, 110 Tenn., 263.
Hester vs Murphrey, 1 Ark., 55.
Talbot vs Colier, 102 Ga., 550.
Swingley vs Haynes, 22 Ill., 214.
Baltimore R. Co. vs Tess 2 Ind. App., 507.

Cane vs Watson, Morr. 52. (Iowa).
McCubrey vs Lankins, 74 Minn., 302.
Gage vs Maryatt, 9 Mont., 265.
Pearson vs Kansas Mfg. Co., 14 Neb. 211.
Wood vs Randall, 5 Hill, 264.
Lyons vs Miller, 2 N. D. 1.

The theory upon which the honorable Circuit Court of Appeals reversed the decision of the district court was clearly upon the conclusion of the court that the *situs* of this fund was not in Florida, but that it followed the person of the creditor. While it is true, under the early decisions of the common law court, the maxim "*Mobilia sequuntur personam*" was held to be applicable to an ordinary debt upon the theory that personal property by reason of its nature followed the person of the owner, but the law is a progressive science, conditions with respect to ownership of property have changed with the march of commerce, and now by far the greater wealth of the nation consists in movable property, such as securities, stocks, and property of the character here involved.

The law is well settled that for the purposes of administration, garnishment or attachment, the *situs* of a debt is the home of the debtor, the debt being the *res* which gives character to the action as one in *rem*.

This has been expressly held by this court in,

C. R. I. & P. R. R. vs Strum, 174 U. S., 810.
See also Rood on Garnishment, Sec. 245.
Harvey vs Great Northern R. R., 52 N. W., 905.
Hamilton vs Rogers, 67 Michigan, ...
Shinn on Attachment and Garnishment, Sec. 490.

Any other view than that this judgment, sequestrating as it does, a particular fund, can be collaterally attacked, will be productive of confusion, e. g., while a decree protects the successful party so long as he is

within the limits of the state, is no protection anywhere else.

See Green vs Van Buskirk, 5 Wall., 307.
Wharton on Conflict of Laws, 3d Ed., Vol 1, Sec. 310.

It will be seen from examination of the transcript and decision of the Circuit Court of Appeals in the instant case that there is a divergence of opinion and ruling between the Federal and State Courts in the following particulars:

1. The Supreme Court of Florida found as a fact that the *res* was before the Circuit Court of Hamilton County, Florida, and that the said court had jurisdiction.

The said Circuit Court of Appeals in its decision decided in effect that the *situs* of the *res* is at the home of the creditor, and that the decision of the Supreme Court of Florida that its *situs* was in the bank of your petitioner, is erroneous.

2. The Supreme Court of the State of Florida in its decision determines that the appeal of the plaintiff in error was an appearance in the state court so as to vest said court with jurisdiction of its person under its construction of the Florida practice.

The Circuit Court of Appeals in its decision in the instant case in effect determines that the decision of the State Court that an appeal operated as an appearance was erroneous.

In conclusion, we respectfully submit that a fair construction of the decision which is made the basis of this petition discloses that the Circuit Court of Appeals has jurisdiction to review the decision of the District Court solely upon the ground of diversity of citizenship; that its finding and decision that the proceeding in the state

court in the case of Rome Insurance Company vs Corbett, 63 Sou. Rep. 833, was not *res adjudicata*, when set up in a plea admitted to be in proper form in the District Court, is in effect a reversal of the decision of the Supreme Court of Florida.

In rendering this decision, we respectfully submit the said Circuit Court of Appeals assumes and exercises a jurisdiction not authorized by the Constitution and Laws of the United States; a jurisdiction which could not even be exercised by this honorable court save where a Federal question is involved. This principle and the danger of the exercise of a jurisdiction not contemplated by the Constitution and Laws of the United States has been ably pointed out by this court in the cases hereinafter cited.

While it is true that this honorable court has held in some decisions, notably C. & N. W. Ry. Co. vs Osborn, 146 U. S., 355, that the right of the Supreme Court to issue writs of *certiorari* will be sparingly exercised, yet in the case of Forsyth vs Hammond, the broad doctrine is announced, "That the power of this court in *certiorari* extends to every case pending in the circuit court of appeals, and may be exercised *at any time* during such pendency."

An examination of the transcript will disclose a case of conflict of decisions, not only between judges of equal rank in our Federal judiciary, but also a case of conflict of opinion and jurisdiction between the highest court of a state of the nation and the circuit court of appeals; it is manifest also that the decision of the last named court is *final* and conclusive as *settling* the *law* of the instant case for under the decision of that tribunal nothing remains, according to the admission in the pleadings for the district court to do except to entertain jurisdiction, strike the plea of *res adjudicata* filed by the

defendant in the lower court and enter a judgment against the petitioner in the instant case.

Forsyth vs Hammond, 166 U. S., 504.
United States vs Three Friends, 166 U. S. 1.

Respectfully submitted,

Wm Wade Hampton

Counsel for Petitioner.

W. S. Hampton

S. S. Sandford

Of Counsel.

FILED
JUN 1 1920
JAMES D. MAHER,
CLERK.

In the Supreme Court of the United States

OCTOBER TERM, 1919.

No. 373

FIRST NATIONAL BANK OF JASPER, FLORIDA,
a Corporation, Petitioner,

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STATE BANK OF ROME,
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PETITION FOR WRIT OF CERTIORARI.

To the

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FOR THE FIFTH CIRCUIT.

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Of Counsel,
Tampa, Fla.

NOTICE TO COUNSEL

To Messrs. William E. Kay, John L. Doggett, L. A. Dean, I. E. Dean and Henry C. Clark, Counsel of Record in the Circuit Court of Appeals for the Respondent herein:

Please take notice that on Monday, the 4 day of October A. D. 1920, at the opening of court on that day, or as soon thereafter as petitioner may be heard, we shall submit to the Supreme Court of the United States, at its court room in the Capitol in the city of Washington, the following petition for a writ of certiorari in the case there entitled together with the brief in support thereof accompanying the same.

Dated at Tampa, Florida, this 2 day of August 1920.

WM. WADE HAMPTON,
Attorney for Petitioner.

Service of the foregoing notice, together with a copy of the accompanying petition and brief, is hereby accepted.

.....
Of Counsel for Respondent.

IN THE SUPREME COURT OF THE

UNITED STATES.

OCTOBER TERM, 1919.

No.....

FIRST NATIONAL BANK OF JASPER, FLORIDA,
a Corporation, Petitioner,

vs.

STATE BANK OF ROME,
a Corporation, Respondent.

PETITION FOR WRIT OF CERTIORARI.

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

The petition of The First National Bank of Jasper, Florida, a corporation, respectfully shows unto this Honorable Court as follows:

FIRST: This cause involves a conflict between the Supreme Court of the State of Florida and the United States Circuit Court of Appeals in and for the Fifth Circuit.

SECOND: This cause was instituted against your petitioner in the United States District Court in and for the Southern District of Florida on the 27th day of January, A. D. 1913, by the respondent herein, seeking to recover on certain certificates of deposit issued by your petitioner (Transcript p. 1). The jurisdiction of the trial court was based on diversity of citizenship. (Transcript p. 3).

THIRD: Prior to the institution of this action in the United States District Court as aforesaid on to-wit the 3rd day of January, A. D. 1913, there were filed in the Circuit Court in and for Hamilton County, Florida, a court of general jurisdiction, bills of complaint by J. H. Corbitt and others, in separate suits, against Rome Insurance Company, American Bank and Trust Company, and First National Bank of Rome, Georgia, and against your petitioner, (Transcript p. 61); that in and by said bills of complaint it was prayed that certain certificates of deposit (being the same certificates of deposit sued on in this cause) be declared to be null and void, and that your petitioner be restrained from paying the proceeds thereof to respondent in this cause, or any one for it (Transcript p. 68); that said certificates of deposit (Transcript p. 8) are identical in all respects save the numbers thereof and the amounts vary, and the names of the persons depositing the proceeds of same, said certificates being in words and figures following, to-wit:

CERTIFICATE OF DEPOSIT.

No. 895.

Jasper, Fla., Nov. 25, 1911.

THE FIRST NATIONAL BANK, JASPER, FLA.

This certifies that.....has deposited in this Bank.....Dollars, payable to the order of American Bank and Trust Co.

Trustee, Rome, Ga. in current funds on return of this certificate properly endorsed with interest at four per cent per annum (not over.....Dollars). No interest paid for fraction of a month. Not payable until Nov.....1912.

C. GILBERT, Cashier.

8.....

8.....

That in said suits in the said circuit court in and for Hamilton County, Florida, service of process was had upon Respondent (the original plaintiff herein) by publication, under the provisions of Section 1866 General Statutes of Florida and Chap. 5913 Laws of Florida 1909 (Transcript p. 57); that your petitioner, a resident of the State of Florida, was personally served with process.

That upon the return day fixed in the order of publication of process, Respondent (Original plaintiff herein) filed special appearances and motions to quash the service (Transcript p. 89) which motions were in substance confined to the one ground that the proceedings brought in the state court were actions *in personam* and that there had been no personal service on said Respondent. These motions having come on to be heard before the Circuit Court of Hamilton County, Florida, said court on the 3rd day of April, A. D. 1913, did deny said motions.

Thereupon, on the 10th day of April, A. D. 1913, stipulations were entered into between solicitors for the respective parties in the suits in the State court (Transcript p. 92) providing that all proceedings in said suits be stayed pending the prosecution of an appeal to the Supreme Court of Florida in the case of J. H. Corbitt vs Rome Insurance Company, et als., which appeal was from orders of the State court denying similar motions to quash service by publication on similar grounds, and which appeal under the decisions of the Supreme Court of Florida constituted a general appear-

ance by the appellant (Respondents herein); and it was further provided in and by said stipulation (Transcript p. 92) that the ultimate decision of the said appeal in said case of J. H. Corbitt vs Rome Insurance Company, et als., would be decisive of the validity of the service by publication on the defendants in those suits.

That at the June term of the Supreme Court of Florida, said Supreme Court affirmed the order of the lower court in the case of J. H. Corbitt vs Rome Insurance Company, et als., (Transcript p. 86) in words and figures a sfollows, to-wit:

"In the Supreme Court of Florida,

June Term, A. D. 1913.

"Rome Insurance Company, a Georgia Corporation, and other Appellants,

vs.

J. H. Corbitt, Appellee.

Hamilton County.

COCKREL, J.:

"A bill was filed in the Circuit Court for Hamilton County against local defendants and also certain non-residents corporations seeking to impound a fund in that county arising out of an alleged fraudulent transaction consummated in that county. Constructive service, in perfect accordance with the statute was had by publication, and the non-residents corporations appeared specially to quash the service upon the theory that the sole relief prayed was *in personam*, and that therefore the statute authorizing constructive service by publication does not apply. This motion having been denied these non-residents have sued out what they term a special appeal.

"It may well be that this appeal so operates as a general appearance in the circuit court as to render the question before us a moot one, but the Appellee does not ask us to so hold, and it appears that this is but a test case, upon the decision of which many other cases in that court are depending.

"The bill confined its prayer to an adjudication of the funds sought to be impounded, and does not pray for a general personal decree against these non-residents

and we are not to assume from the face of the bill that the Circuit Court will enter an unauthorized decree; and we have not before us any such question of jurisdiction as was involved in the case of Pennoyer vs Neff, 95 U. S., 714.

82. "The purpose of the statute authorizing constructive service by publication is to notify non-residents of the pending suit so that they may, if they care to do so, come into the case and if the statute be followed, there is no right in the non-resident to quash this notice; he has his right if not waived to object should the court thereafter commit an error against him.

"Our constructive service statute is broad enough to apply to any suit in equity pending in our Circuit Court, and as has been said in Kilpatrick vs Post, 53 N. J. Eq., 591 text 597 32 Atl. Rep. 267, cannot be confined in its operation to the cases where the court might make final decree or judgment. Further that Court says: 'It was not intended that the question of the power to enter the ultimate decree or judgment should enter into the question of the right to give notice of the suit to a non-resident, or that this question of jurisdiction should be settled on a motion to discharge the order of publication. The complainant is entitled to have the question of jurisdiction settled by a final decree.'

"We are not to be understood as holding that the court might not quash a service by publication, if the bill upon its face showed that it was clearly a common law cause of action, and that the resort to the equity side of the court was a subterfuge; the bill before us does not present that case."

"The Order is affirmed:

"Shackleford, C. J. and Taylor, Hocker and Whitfield, J. J. concur."

That thereafter Respondent herein took no further part in the proceedings in the State Court (Transcript p. 18) and on the 14th day of July, A. D. 1914, final decrees were entered in the state court (Transcript p 18) which decrees adjudged that the certificates of deposits therein mentioned (being the same certificates of deposit herein sued upon) were void and of no effect

and enjoining your petitioner from paying the proceeds thereof to Respondent herein or to any one for it; that said decrees and each of them are still of full force and effect.

FOURTH: That on the 3rd day of August, A. D. 1914, in this suit instituted in the United States District Court in and for the Southern District of Florida by Respondent herein against your petitioner, your petitioner did file pleas of *res adjudicata*, (Transcript p. 11) setting up the decrees entered in the Circuit Court in and for Hamilton County, Florida, which decrees adjudged the certificates of deposit herein sued upon to be void and of no effect, and which enjoined your petitioner from paying the proceeds thereof to the plaintiff below (Respondent herein) or to any one for it. Certified copies of said decrees were attached to said pleas (Transcript p. 18).

FIFTH: That on the 7th day of September, A. D. 1914, the plaintiff in the trial court, Respondent herein, filed a demurrer to said pleas (Transcript p. 33) which said demurrer coming on to be heard before the District Judge of said Court, was on the 12th day of January, A. D. 1915, over-ruled, (Transcript p. 36).

SIXTH: That thereafter, on the 15th day of June, A. D. 1915, said Respondent filed replications to said pleas, (Transcript p. 38) setting up in substance by said replications that the chancery suits mentioned in your petitioner's pleas, and which are fully described in the third paragraph of this petition, were action *in personam;* that no personal service was ever had on said Respondent herein; that it did not at any time or any manner appear in said suits, except specially, to contest the service by publication therein made, and that it in no way waived the want of jurisdiction of the State court over its person; there were attached to said replication copies of the records in the said Chancery suits mentioned, (Transcript p. 47-56).

SEVENTH: That on the 5th day of July, A. D. 1915, your petitioner filed a motion to strike (Transcript p. 98-99) and a demurrer (Transcript p. 99) to said replications which said motion and demurrer coming on to be heard by the Court, the said demurrer was, on the 2nd day of February, A. D. 1917, sustained as to each of said replications (Transcript 102).

EIGHTH: That on the 9th day of January, A. D. 1919, the plaintiff in the trial court filed a declination to plead further (Transcript p. 104). Thereupon on the 9th day of January, A. D. 1919, final judgment was entered in favor of your petitioner (Transcript p. 105).

NINTH: That from said judgment said Respondent sued out a writ of error to the Circuit Court of Appeals of the United States for the Fifth Circuit which court on the 10th day of March, A. D. 1920, reversed the judgment of the District Court, holding in effect:

(a) That the Circuit Court in and for Hamilton County, Florida, acquired no jurisdiction over the person of respondent herein, by the service by publication made in said suits.

(b) That said Circuit Court in and for Hamilton County, Florida, acquired no jurisdiction over the fund or *res* sought to be impounded in said chancery suits, as the same was not under the control of the Court.

(c) That the Florida Court had no jurisdiction to render the said decrees as to non-residents.

(d) That the said court did not purport to determine the personal liability of your petitioner to the plaintiff on the said certificates of deposit.

(e) That the prosecution of the appeals by the respondent herein to the Florida Supreme Court, did not amount to general appearances in the State Court of Florida and this holding is in conflict with the decision of the Supreme Court of Florida.

TENTH: That a certified copy of the entire record in this cause in the Circuit Court of Appeals of the United States for the Fifth Circuit is hereby furnished, attached hereto and made a part of this petition, and marked Exhibit "A," all in compliance with Rule 37 of this Honorable Court.

ELEVENTH: Your petitioner is advised and believes that the aforesaid judgment of the United States Circuit Court of Appeals for the Fifth Circuit is erroneous, and that this honorable court should require the said case to be certified to it for its review and determination, in conformity with the provisions of the Act of Congress in such case made and provided, said case being final in said United States Circuit Court of Appeals by the provisions contained in Section 128 of the United States Judicial Code.

TWELFTH: Your petitioner further represents unto this Honorable Court that the aforesaid judgment of the United States Circuit Court of Appeals for the Fifth Circuit presents a conflict of State and Federal jurisdiction and in effect reverses the decisions of the Supreme Court of the State of Florida in the cases of Rome Insurance Company, et als., vs B. F. Carter (63 Sou. 834) and Rome Insurance Company et als. vs J. H. Corbitt, (63 Fla. 833) and denies them full faith and credit, for the following reasons:

(a) The United States Circuit Court of Appeals held that the prosecutions of the appeals in the State Court did not amount to general appearances, whereas the Florida Supreme Court, following the established rule of practice in that State, held that the prosecution of an appeal constitutes a general appearance in the lower court.

(b) The Florida Supreme Court held that the service of publication upon Respondent herein original plaintiff in this action, was valid so as to bring its person within the jurisdiction of the court for the relief

prayed in the bills of complaint. The Circuit Court of Appeals held otherwise.

(c) The Florida Supreme Court held that the bills of complaint confined their prayers to an adjudication of a fund sought to be impounded, and that said fund was within the jurisdiction and control of the State Court; the said Circuit Court of Appeals by its decree in effect denies this.

THIRTEENTH: Your petitioner further represents that said judgment of the United States Circuit Court of Appeals for the Fifth Circuit is erroneous on the following grounds:

(a) The fund impounded by the decrees in the State Court had its *situs* in the State of Florida, and not in the State of Georgia; because:

(aa) The money was not to be payable except "on the return of this certificate properly endorsed."

(bb) The certificate was not subject to check.

(cc) The deposit was made for a specific purpose and was not the part of a general fund.

(dd) The *situs* of a debt, for the purpose of administration and garnishment, is the home of the debtor.

(b) The proceedings in the State Court, the decrees in which were set up as a defense by your petitioner in the District Court, were proceedings *in rem*, to the validity of which personal service is unnecessary.

(c) If any defects existed in the State Court's jurisdiction over Respondent, such defects, under the rulings of the Supreme Court of Florida, were waived by the prosecution of the appeal to the Florida Supreme Court.

FOURTEENTH: Your petitioner further represents that no question was raised by the plaintiff, either in the District Court or in the Circuit Court of Appeals as to the sufficiency of your petitioner's pleas of *res adjudicata*, except that the proceedings in the State Court were actions *in personam* and that no personal service was had on the plaintiff, one of the defendants in those proceedings.

FIFTEENTH: Your petitioner further represents that the said United States Circuit Court of Appeals for the Fifth Circuit in denying to your petitioner the benefit of the adjudication of the Supreme Court of Florida of a statute of that state, assumed a jurisdiction which not even the Supreme Court of the United States has power to assume.

WHEREFORE, your petitioner respectfully prays that a writ of certiorari may be issued out of and under the seal of this Court, directed to the United States Circuit Court of Appeals in and for the Fifth Circuit, commanding the said court to certify and send to this Court, on a day certain therein to be designated, a full and complete transcript of the record and all proceedings of the said cause against said respondent, to the end that the said case may be reviewed and determined by this court, as provided in and by Section 240 of the United States Judicial Code, or that your petitioner may have such other or further relief or remedy in the premises as to this Court may seem appropriate and in comformity with said provision of the Judicial Code, and that the said judgment of said Circuit Court of Appeals in said case, and every part thereof, may be reversed by this Honorable Court.

And petitioner will ever pray, etc.

Wm. Wade Hampton

Attorney and Counsel for Petitioner.

IN THE

SUPREME COURT OF THE UNITED STATES

THE FIRST NATIONAL BANK OF JASPER, FLORIDA,
Petitioner

vs.

THE STATE BANK OF ROME, GEORGIA,
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE UNITED STATES FOR FIFTH CIRCUIT

BRIEF OF PETITIONER, FIRST NATIONAL BANK OF JASPER, FLORIDA.

STATEMENT

The foregoing is a cause originating in the District Court of the United States for the Southern District of Florida, wherein First National Bank of Rome, Georgia, was plaintiff, and petitioner was defendant, a judgment on demurrer, upon over-ruling demurrer to plea of *res adjudicata* in said cause by the District Court was made the basis of a writ of error to the said Circuit Court of Appeals.

The decision of the appellate court, reversing the decision of the district court is made the basis of the petition for certiorari, in the instant case, as the defendant in error under the Constitution and Statutes of the

United States is not entitled to have its cause presented to this honorable court by appellate proceedings, the decision of the said Circuit Court Appeals being final.

ARGUMENT

The court will observe by reference to the transcript of the record that the basis for the plaintiff's action in the lower court was a certificate of deposit placed in petitioner's bank on November 22, 1911 (transcript p. 9). This certificate of deposit was sought to be invested with a trust on behalf of certain claimants thereto, and process by publication was regularly had, upon the plaintiff in error, under a statute of Florida which the Supreme Court of Florida has held "is broad enough to apply to any suit in equity pending in our circuit court," the suit in which the Bank deposit was sought to be invested with a trust was begun and prosecuted in the Circuit Court of Hamilton County, Fla.

Section 1866, General Statutes of Florida (Chap. 5393 (Laws of Florida), A. D. 1905.

Chapter 5913, Laws of Florida, 1909.

Such statutes have uniformly been held to be constitutional in all cases where the status of a *person* or *res* within the jurisdiction of the court is sought to be determined.

> Loaiza vs Sup. Ct. 9 L. R. A. 377.
> Pennoyer vs Neff 95 U. S. 714.
> Boswell's Lessee vs Otis, et al, U. S. 13 Law Ed. p. 165.
> Black on Judgments, Vol. 2, Sec. 793.
> Gillon vs Wear, 28 S. W., 1014.
> Arndt vs Griggs, 134 U. S., 316.
> Hamilton vs Lewis, 161 U. S. 256.

The plaintiff in error appeared before the Circuit Court for Hamilton County, Florida, attacked the constructive service upon the sole ground that the fund

could not be impressed with a trust without personal service and that no personal service was had upon the plaintiff in error.

The decision of said court was adverse to this contention whereupon the plaintiff in error from such decision appealed to the Supreme Court of Florida. In said last named court the decision of the lower court was upheld, the Supreme Court of Florida holding in effect:

(a) That the foregoing statutes providing for constructive service are broad enough to apply to the present litigation, and that service by publication under said statutes invested the lower with jurisdiction over the *res* so as to enable said court to enter a decree determining its ownership.

(b) That the appearance of the plaintiff in error by suing out an appeal from the decision of the lower court, and becoming an actor therein invested the Florida courts with jurisdiction of its person.

Rome Ins. Co. vs Corbett, 66 Fla., 438, 63 Sou 833.

This judgment is, therefore, binding upon the Federal Court because it is the judgment of a court of record of general jurisdiction, and the question of jurisdiction, involving as it does, a principle of practice of the state courts, is binding and conclusive upon the Federal courts, and cannot be collaterally impeached, reviewed, or re-examined, as touching the merits of the original controversy.

Black on Judgments, Vol. 1, Sec. 270.
Ency of Law, Vol. 23, p. 1596.
Hubbard vs American Investment Co., 70 Fed., 808.
Sipe vs Coprell, 59 Federal, 970.
Colt vs Colt, 111 U. S., 556.
Duncan vs Gegan, 101 U. S., 810.

In the absence of a Federal question, the decision of a state court upon the determination of its jurisdiction

involving the construction of a statute of that state is binding and conclusive upon the Federal courts.

> Fallbrook Irrigation District vs Bradley, 164 U. S., 112.
> See also 101 U. S., 551.
> Terry vs Davis, 107 Fed., 50.

One who has voluntarily sought the judgment of the Supreme Court of a state to declare that a decree of a lower court was not only erroneous but void, although not a voluntary litigant in the trial court, is bound by the judgment of the Supreme Court, as *res judicata* and cannot attack it collaterally in a circuit court of the United States.

> Forsyth vs City of Hammond, 166 U. S., 504.

If the question of jurisdiction depends on some local statute, and it is presented to and decided by the court rendering the judgment, such decision is binding on the Federal Courts.

> See Colt vs Colt, 112 U. S., 566.
> Duncan vs Gegan, 101 U. S., 810.

That the bringing of an action upon the certificate of deposit in the U. S. District Court, under the decision of the state court in Rome Insurance Company, *supra*, is a collateral attack upon the state court judgment,

> See Supervisors vs United States, 4 Wall., 435.
> Harris vs Hardeman, 14 How. 334.

Under the decision of the Supreme Court of Florida in Rome Insurance Company vs Corbett, *supra*, the transcript showed that the plaintiff in error took no farther proceeding in the state court,—permitting the cause to go to a final judgment, and this judgment is made the basis of the plea of *res adjudicata* filed in the

District Court by the petitioner (Transcript p.....). This decree has never been reversed, nor has any appeal been prosecuted therefrom to the Supreme Court of Florida, and it is therefore of full force and effect.

> Central Trust Company vs. Seasongood, 130 U. S., 32.

Counsel for plaintiff in error have argued that the decision of the Florida court cannot be made the basis of *res adjudicata* for the reason that equity acts *in personam*, and that the instant case, lacking as it does the essentials of an action *in rem* strictly considered is in effect merely a determination of the personal rights and obligations of the parties, therefore it cannot be made the basis of a decree *in rem* upon constructive service.

Unfortunately for this contention, this honorable court has held to the contrary, and the record in this case shows with respect to the certificate:

(a) That the money was not to be payable except on "return of this certificate properly endorsed."

(b) That the money was not to be removed from the bank of the petitioner under any circumstances until after November 22, 1912, nearly one year from date of deposit.

(c) That the certificate was not subject to check.

(d) That the decree of the lower court, which appears in the record (Transcript p.....) does not attempt to go further than investing the fund situate in the bank of your petitioner with a trust, and imposes no personal duty or obligation upon either of the parties.

(e) That the fund in part consisted of notes of citizens of Florida, payable in Florida.

A reference to the decisions of this court will show that where the decree confines itself to an adjudication of title to a fund before the court, it is a proceeding *quasi in rem*.

"The state has jurisdiction over property within its limits owned by non-residents, and may, therefore, subject it to payment of demands against them of its own citizens."

Freeman vs Alderson, 119 U. S., 373.
Black on Judgments, 2d Ed., Vol. 2, Sec. 793.
Arndt vs Griggs, 134 U. S., 316.
Bennett vs. Fenton, 10 L. R. A., 500.
Hamilton vs Lewis, 151 U. S., 256.
Gillon vs Wear, 28 S. W., 1014.
Hardy vs Beatty, 19 S. W., 778.
Palmer vs McCormick, 30 Fed., 82.
Purdy vs Wallace, 81 Fed., 515.
Story's Equitable Jurisprudence, 14 Ed., Sec. 93.

That the principle applies a *fortiori* where personal property involved, see an able decision by Judge Shiras, in

Louizi vs Supreme Ct., 9 L. R. A., 377.

Under the Florida practice, appeals are allowed from interlocutory as well as final decrees.

That an appeal from a decree is an appearance vesting the court with jurisdiction over the person of appellant, see

Drew Lbr. Co. vs Walter, 45 Fla., 252; 34 Sou. Rep. 244.
Barwick vs Rouse, 43 Sou. Rep., 753.
Hayman vs Weil, 44 Sou. Rep., 176.
Rumeli vs City of Tampa, 48 Fla., 112; 37 Sou. Rep. 563.
Wilson vs Brandenburg, 16 Ark., 646.
Wylly vs Sanford, L. & T. Co., 44 Fla., 818; 33 Sou. 453.
Bustamente vs Bescher, 43 Miss., 172.
Taylor vs Sledge, 110 Tenn., 263.
Hester vs Murphrey, 1 Ark., 55.
Talbot vs Colier, 102 Ga., 550.
Swingley vs Haynes, 22 Ill., 214.
Baltimore R. Co. vs Tess 2 Ind. App., 507.

Cane vs Watson, Morr. 52. (Iowa).
McCubrey vs Lankins, 74 Minn., 302.
Gage vs Maryatt, 9 Mont., 265.
Pearson vs Kansas Mfg. Co., 14 Neb. 211.
Wood vs Randall, 5 Hill, 264.
Lyons vs Miller, 2 N. D. 1.

The theory upon which the honorable Circuit Court of Appeals reversed the decision of the district court was clearly upon the conclusion of the court that the *situs* of this fund was not in Florida, but that it followed the person of the creditor. While it is true, under the early decisions of the common law court, the maxim "*Mobilia sequuntur personam*" was held to be applicable to an ordinary debt upon the theory that personal property by reason of its nature followed the person of the owner, but the law is a progressive science, conditions with respect to ownership of property have changed with the march of commerce, and now by far the greater wealth of the nation consists in movable property, such as securities, stocks, and property of the character here involved.

The law is well-settled that for the purposes of administration, garnishment or attachment, the *situs* of a debt is the home of the debtor, the debt being the *res* which gives character to the action as one in *rem*.

This has been expressly held by this court in,

C. R. I. & P. R. R. vs Strum, 174 U. S., 810.
See also Rood on Garnishment, Sec. 245.
Harvey vs Great Northern R. R., 52 N. W., 905.
Hamilton vs Rogers, 67 Michigan, ...
Shinn on Attachment and Garnishment, Sec. 490.

Any other view than that this judgment, sequestrating as it does, a particular fund, can be collaterally attacked, will be productive of confusion, e. g., while a decree protects the successful party so long as he is

within the limits of the state, is no protection anywhere else.

> See Green vs Van Buskirk, 5 Wall., 307.
> Wharton on Conflict of Laws, 3d Ed., Vol 1, Sec. 310.

It will be seen from examination of the transcript and decision of the Circuit Court of Appeals in the instant case that there is a divergence of opinion and ruling between the Federal and State Courts in the following particulars:

1. The Supreme Court of Florida found as a fact that the *res* was before the Circuit Court of Hamilton County, Florida, and that the said court had jurisdiction.

The said Circuit Court of Appeals in its decision decided in effect that the *situs* of the *res* is at the home of the creditor, and that the decision of the Supreme Court of Florida that its *situs* was in the bank of your petitioner, is erroneous.

2. The Supreme Court of the State of Florida in its decision determines that the appeal of the plaintiff in error was an appearance in the state court so as to vest said court with jurisdiction of its person under its construction of the Florida practice.

The Circuit Court of Appeals in its decision in the instant case in effect determines that the decision of the State Court that an appeal operated as an appearance was erroneous.

In conclusion, we respectfully submit that a fair construction of the decision which is made the basis of this petition discloses that the Circuit Court of Appeals has jurisdiction to review the decision of the District Court solely upon the ground of diversity of citizenship; that its finding and decision that the proceeding in the state

court in the case of Rome Insurance Company vs Corbett, 63 Sou. Rep. 833, was not *res adjudicata*, when set up in a plea admitted to be in proper form in the District Court, is in effect a reversal of the decision of the Supreme Court of Florida.

In rendering this decision, we respectfully submit the said Circuit Court of Appeals assumes and exercises a jurisdiction not authorized by the Constitution and Laws of the United States; a jurisdiction which could not even be exercised by this honorable court save where a Federal question is involved. This principle and the danger of the exercise of a jurisdiction not contemplated by the Constitution and Laws of the United States has been ably pointed out by this court in the cases hereinafter cited.

While it is true that this honorable court has held in some decisions, notably C. & N. W. Ry. Co. vs Osborn, 146 U. S., 355, that the right of the Supreme Court to issue writs of *certiorari* will be sparingly exercised, yet in the case of Forsyth vs Hammond, the broad doctrine is announced, "That the power of this court in *certiorari* extends to every case pending in the circuit court of appeals, and may be exercised *at any time* during such pendency."

An examination of the transcript will disclose a case of conflict of decisions, not only between judges of equal rank in our Federal judiciary, but also a case of conflict of opinion and jurisdiction between the highest court of a state of the nation and the circuit court of appeals; it is manifest also that the decision of the last named court is *final* and conclusive as *settling* the *law* of the instant case for under the decision of that tribunal nothing remains, according to the admission in the pleadings for the district court to do except to entertain jurisdiction, strike the plea of *res adjudicata* filed by the

defendant in the lower court and enter a judgment against the petitioner in the instant case.

Forsyth vs Hammond, 166 U. S., 504.
United States vs Three Friends, 166 U. S. 1.

Respectfully submitted,

Wm. Wade Hamilton

Counsel for Petitioner.

H. L. Hamilton

A. L. Sandford

Of Counsel.

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In the Supreme Court

of the

United States of America

October Term, 1920

No. 372

THE FIRST NATIONAL BANK OF JASPER, FLORIDA.

Petitioner,

VERSUS

THE FIRST NATIONAL BANK OF ROME, GA.,

Respondent.

No. 372

BRIEF OF PETITIONER

WILLIAM WADE HAMPTON,
Gainesville, Florida.
Attorney for Petitioner.

H. S. HAMPTON and
SANFORD & HAMPTON,
on the Brief.

STATEMENT

The defendant, or respondent in error filed suit in the District Court of the United States for the Southern District of Florida upon certain certificates of deposit de-

scribed respectively in the eight counts of his declaration, issue by First National Bank of Jasper, to American Bank and Trust Company, Trustees, and afterwards endorsed to First National Bank of Rome, Georgia. (See trans. rec. pp. 2-6).

The defendant bank therein filed pleas, to each of the special counts (see trans. pp. 8-27 inclusive) setting up former proceedings, to-wit, three suits respectively by O. A. Worley, J. H. Corbett and A. R. McLeod to the above counts in the declaration respectively, and alleging in substance that in the said suits respectively in the Circuit Court of Hamilton County, Florida, the said last named court has decreed that the said certificates of deposit sued upon by the plaintiff herein were procured by fraud of the Rome Insurance Company, and its trustee, were impressed with a trust in favor of the complainants in the respective suits, and that the said certificates of deposit were decreed to be null and of no effect, and the fund in the said First National Bank of Jasper decreed to belong respectively to the complainants in said suit; that said decrees were of full force and effect, and attached to the plea in each case is a copy of the final decree of the Circuit Court for Hamilton County, Florida, which is made a part thereof, and in which is recited the several steps in the respective suits, preceding the final decree.

The respondent or defendant herein in error filed a demurrer to said additional pleas (pp. 27-28 trans.) and said demurrer coming on to be heard before the District Judge, same was overruled, his opinion being found on pages 29-32 of the transcript.

Thereafter the said respondent herein filed replication to the pleas to each count of the declaration in which it denies that the Circuit Court of Hamilton County acquired jurisdiction save by service by publication, and further denies that the plaintiff in error appeared in said suit, save

specially for the purpose of contesting the pretended service by publication attempted to be made upon it, and attached to the replication is a complete transcript of the record of the proceedings in the circuit court for Hamilton County, Florida, set forth in the pleas filed herein by the defendant (trans. pp. 33-74).

In the transcript of record, attached as exhibited to said special pleas, this Court will note (p. 58) an application to the Court for a supersedeas, which was granted (p. 59) also a supersedeas bond (pp. 60-61) and there is also attached (p. 70) a stipulation of counsel staying proceedings in the suit of J. A. Corbett and A. R. McLeod, and agreeing that the ultimate decision of an appeal in the case of *J. H. Corbett* vs. *Rome Insurance Company* shall be decisive of the validity of the service by publication on the said defendant in this case.

The petitioner herein by counsel filed motion to strike replication, and a demurrer thereto (pp. 74-76) and on July 5, 1915, respondent sought leave of the court to file additional grounds of demurrer which are shown on page 76 of the transcript—said motion was denied (p. 79).

On November 21, 1916, the respondent filed a petition for re-hearing of its demurrer to the petitioner's additional plea, said motion to withdraw replication and file additional grounds of demurrer, and petition for re-hearing coming on to be heard February 2, 1917, were overruled by the court (p. 79 of trans.)

The cause coming on to be heard on February 2, 1917, upon demurrers and motion to strike the replication filed by the respondent to said additional pleas, the demurrers and each of them were sustained (p. 79).

On January 8, 1919, the parties entered into an agreement (p. 80) withdrawing all please save additional pleas 1 to 4 set forth in the transcript (pages 1 to 5 inclusive).

The respondent having declined to plead further and petitioner in error moving for a final judgment, thereupon on January 9, 1919, the court entered a judgment in favor of the petitioner, and from that judgment the respondent sued out a writ of error to the Circuit Court of Appeals, Fifth Circuit (pp. 81-82) assigning a number of errors (pp. 84-86) various steps in perfecting appeal (pp. 87-92).

The Court of Appeals reversed the judgment of the District Court opinion (pp. 93-98).

ARGUMENT

For convenience we will argue the specifications of plaintiff in error as they appear in its brief.

Specifications of Errors 1 and 2

The Court will observe that the real controversy involved in this cause is an attempt on the part of the respondent to test the sufficiency of the jurisdiction of the Circuit Court for Hamilton County in the original proceeding, in which service by publication was had upon the respondent as defendant.

The Court will also observe that in the original suits in the Circuit Court for Hamilton County, Florida, the court assumed jurisdiction by reason of the existence of two facts which are undisputed:

(a) The *res* or fund sought to be impressed with a trust in favor of the complainants in the original suit was situate within the jurisdiction of the court, to-wit, in Hamilton County, Florida.

(b) Service by publication was had in the form prescribed by the statutes of Florida upon the plaintiff as co-defendant in said suit.

No attack has been made upon the sufficiency of the pleading wherein the special pleas set up *res judicata*,

save the position taken by the respondent in the pleading attacking the legality of service by publication, but the respondent relies in the lower court upon the ground that the original suits in equity in the Circuit Court of Hamilton County were in their nature suits in *personam*.

While we confidently believe, as will be shown hereafter in this brief, that the respondent has vested the Circuit Court of Hamilton County with jurisdiction of its person by appearance, we will assume, for the sake of argument, that its conduct has not amounted to an appearance in said court, and test the jurisdiction of the Court upon the record of constructive service.

The statutes of Florida provide certain requirements whereby constructive service may be had upon a non-resident defendant.

Section 1866 General Statutes of Florida.

By Chapter 5393, Act of 1905, the jurisdiction of chancery courts to enter decrees upon constructive service is extended to partition, for specific performance of a contract to convey or exchange real estate, or other suit in chancery, relating to or affecting the title to real estate.

Chapter 5393 Laws of Florida, 1905;

Chapter 5913 Laws of Florida, 1909.

Such statutes have uniformly been held to be constitutional in all cases where the status of a *person* or *res* within the jurisdiction of the Court is sought to be determined.

Pennoyer vs. *Neff*, 95 U. S., 714;
Loaiza vs. *Sup. Ct.*, 9 L. R. A., 377;
Boswell's Lessee vs. *Otis, et al.*, U. S., 13 Law Ed., p. 165;
Black on Judgments, Vol. 2, Sec. 793;
Gillon vs. *Wear*, 28 S. W., 1014;
Arndt vs. *Griggs*, 134 U. S., 316;
Hamilton vs. *Lewis*, 161 U. S., 256.

This Court will find a stipulation embodied in the record by respective counsel in the lower court that the decision of the Supreme Court of Florida in the case of *Rome Insurance Company* vs. *Corbett*, then pending shall be "decisive of the validity of the service by publication on the said defendant in this case" (see trans. p. 70).

We find by adverting to the decision that upon an appeal prosecuted by the respondent to the Supreme Court of Florida, attacking the validity of service by publication of this case, the decree of the Court and its assumption of jurisdiction has been upheld, holding "Our constructive service statute is broad enough to apply to any suit in equity pending in our circuits courts." The Court further holds "We are not to be understood as holding that the Court might not quash a service by publication if the bill upon its face showed that it was clearly a common law cause of action, and that the resort to the equity side of the Court was a subterfuge: the bill before us *does not* present that case."

Rome Insurance Co. vs. *Corbett*, 66 Fla., 438, 63 Sou. Rep., 833;

First National Bank vs. *Eastman*, 14, Calif., 487;

A. & E. Annotated Cases, Vol. 1, p. 626.

This brings us to a consideration of the question where service by publication is made in a cause under a valid State statute and is upheld by the Supreme Court of that state in a direct proceeding brought for that purpose: the decree in that proceeding appears in the record in this cause to be not a decree in *personam*, but a decree determining the *status* of a fund before the Court. That decree is now sought to be reviewed and set aside in a district court of the United States.

It appears upon the face of the record that the Circuit Court of Hamilton County, Florida, is a court of record,

and a court of general jurisdiction; therefore, we are entitled to not only the presumption of jurisdiction of the Court, but to the regularity of all proceedings precedent to its final decree.

Black on Judgments, Vol. 1, Sec. 270.

A judgment rendered by a State court of competent jurisdiction is binding and conclusive upon the parties when made the basis of a claim or defense in any court of the United States, and cannot be collaterally impeached, or reviewed, or re-examined as touching the merits of the original controversy.

23 Cyc. p. 1596, and case cited under note B.

If the question is one of jurisdiction, and depends on some local law or statute, and is presented to and decided by the court rendering the judgment, such decision is binding on the Federal Courts.

Hubbard vs. *American Investment* Co., 70 Fed., 808;
Sipe vs. *Coprell*, 59 Fed., 970;
Colt vs. *Colt*, 111 U. S., 556;
Duncan vs. *Gegan*, 25 Law. Ed. (U. S.) p. 875.

This Court has said in the case hereinafter cited, upon a state of facts similar to the case at bar, where jurisdiction was denied: "Having appeared for the purpose of challenging the jurisdiction of the Court, the decision of the Court upon that issue is conclusive until annulled, or reversed by some court having jurisdiction to revise and correct error. However erroneous the conclusions of the Jefferson Circuit Court may have been, and we intimate nothing in that respect, its judgment is certainly not void, and in a proceeding of this kind we must accept it as a valid and legal judgment, for neither the circuit court or

this Court has any character of appellate or revisory jurisdiction over that Court."

Phelps vs. *Mutual Reserve Fund Assn.*, 142 Fed., 458.

In the absence of a Federal question, the decision of a State Court upon the determination of its jurisdiction, involving the construction of a statute of that state, is binding and conclusive upon the Federal Court.

Terry vs. *Davis*, 107 Fed., 50;
Fallbrook Irrigation District vs. *Bradley* (U. S.) 11 Law Ed., 369;
See also 101 U. S., 551, and 97 Fed., 525.

That the instant case is a collateral attack of the State Court judgment, see

Supervisors vs. *U. S.*, 4 Wall, 435;
Harris vs. *Hardeman*, 14 How., 334.

We have previously adverted to the fact that the record in this case discloses by exhibit attached to the special pleas, as well as the special replication, after the decision of the Supreme Court of Florida, in the case of *Rome Insurance Company* vs. *Corbett*, 66 Fla., 438, that the Circuit Court for Hamilton County, Florida, pursuant to the mandate of the Florida Supreme Court, has proceeded to a final decree, which is in its nature a decree in *rem* in that no personal liability is attempted to be fixed against the respondent, but the funds in the custody of the court are impressed with a trust in favor of the complainant in the lower court, and the *decree* is *confined* to the *property alone*. This decree has never been reversed nor has the respondent prosecuted an appeal therefrom to the Supreme Court of Florida, therefore, it cannot now be collaterally attacked.

Central Trust Co. vs. *Seasongood*, 130 U. S., 32 Law Ed., 130.

But the learned counsel for the respondent urge that "Equity acts in *personam*," and that the instant case lacking as it does the essentials of an action in *rem* strictly considered, is in its effect, merely a determination of the personal rights and obligations of the respondent; therefore, it cannot be made the basis of a decree in *rem* upon constructive service.

While this view may be technically a correct one, the learned counsel in arriving at their conclusions have evidently ignored a large class of cases which are not strictly actions in *rem*, but are frequently spoken of as actions *quasi* in *rem*, in which the sole purpose is not a decree in *personam*, but to determine the *status* of a *specific* property or *thing*, and the decree in such a case is confined to and operates only upon the thing itself. We know of no better illustration than is embodied in a leading decision of the highest court of our land, in which a definition of this class of cases is given:

> "Actions in *rem*, strictly considered, are proceedings against property alone, treated as responsible for the claims asserted by the libellants or plaintiffs. The property itself is in such actions the defendant, and—except in cases arising during war for its hostile character—its forfeiture or sale is sought for the wrong, in the commission of which it has been the instrument, or for debts or obligations for which by operation of law it is liable. The court acquires jurisdiction over the property in such cases by its seizure, and of the subsequent proceedings by public citation to the world, of which the owner is at liberty to avail himself by appearing as a claimant in the case.
>
> "There is, however, a large class of cases which are not strictly actions in *rem*, but are frequently spoken of as actions *quasi* in *rem*, because, though brought against persons, they seek only to subject certain *property* of those persons to the discharge of the claims asserted. Such are actions in which property of non-residents is attached and held for the discharge of debts due by them to citizens of the

State, and actions for the enforcement of mortgages, and other liens. Indeed, all proceedings having for their sole object the sale or other disposition of the property of the defendant, to satisfy the demands of the plaintiff, are in a general way thus designated. But they differ, among other things, from actions which are strictly in *rem*, in that the interest of the defendant is alone sought to be affected, that citation to him is required, and that judgment therein is only conclusive between the parties.

"The state has jurisdiction over property within its limits owned by non-residents, and may, therefore, subject it to the payment of demands against them of its own citizens."

Freeman vs. *Alderson*, 119 U. S., 373;
Black on Judgments, 2 Ed., Vol. 2, Sec. 793.

"Has the State any power through the Legislature and the Courts, or by any other means or instrumentalities, to dispose of or control property in the State belonging to non-resident owners out of the State, where such non-resident owners will not voluntarily surrender jurisdiction of their persons to the State, or to the Courts of the State, and where the most urgent public policy and *justice* requires that the State and its Courts should assume jurisdiction over such property?"

This question is affirmatively answered by the Supreme Court of the United States in the case of *Arndt* vs. *Griggs*, 33 Law Ed., 921: in that decisioon the Court says:

"All things within the territorial boundary of a sovereignty are within its jurisdiction, and generally within its own boundary its sovereignty is supreme."

In an able decision in the United States Circuit Court in the District of Minnesota, by that eminent Judge Shiras, he discusses this question and analyzes all the decisions touching this subject by the Federal Courts; in this decision he calls attention to the fact that by the Act of Congress, the Federal Courts are likewise vested with power upon constructive service to take jurisdiction of

proceedings to settle adverse claims to realty, or to remove a cloud from the title thereof, and render a decree which shall bar the claim of an absent defendant served only by publication, and he differentiates the ordinary power of a court of chancery which acts in *personam* from that of the power vested by a State statute, and among other things, says:

> "In the absence of statutory authority for the bringing of an action to quiet title, if a claimant invokes the aid of a court of equity to settle the adverse claims made by another, he puts in motion the ordinary equitable powers of the court which are exercised in *personam* * * * in which case the personal service upon the defendant within the limits of the jurisdiction of the court is essential to confer jurisdiction upon the court. In case, however, the State has by statute provided for the title to realty within its borders by proceedings for the quieting of title to a particular tract of land, and has provided that in case an adverse claimant is a non-resident, service by publication may be made, then the court is not proceeding under its *ordinary equitable* power with the limitations pertaining thereto, but is proceeding under the power and rights conferred by the Statute."

Bennett vs. *Fenton*, 10 L. R. A., 500;
Hamilton vs. *Lewis*, 151 U. S., 256;
Gillon vs. *Wear*, 28 S. W., 1014;
Hardy vs. *Beatty*, 19 S. W., 778;
Palmer vs. *McCormick*, 30 Fed., 82;
Purdy vs. *Wallace*, 81 Fed., 515;
Story's Equitable Jurisprudence, 14 Ed., Sec. 93.

The theory upon which the honorable Circuit Court of Appeals reversed the decision of the District Court was clearly upon the conclusion of the Court that the *situs* of this fund was not in Florida, but that it followed the person of the creditor. While it is true, under the early decisions of the common law court, the maxim "*Mobilia sequuntur personam*" was held to be applicable to an ordinary debt upon the theory that personal property by

reason of its nature followed the person of the owner, but the law is a progressive science, conditions with respect to ownership of property have changed with the march of commerce, and now by far the greater wealth of the nation consists in movable property, such as securities, stocks, and property of the character here involved.

The law is well settled that for the purposes of administration, garnishment or attachment, the *situs* of a debt is the home of the debtor, the debt being the *res* which gives character to the action as one in *rem*.

This has been expressly held by this Court in:

> *C. R. I. & P. I. R. R.* vs. *Sturm*, 174 U. S., 810;
> See also *Rood on Garnishment*, Sec. 245;
> *Havey* vs. *Great Northern R. R.*, 52 N. W., 905;
> *Shinn on Attachment and Garnishment*, Sec. 490.

Any other view than that this judgment, sequestrating as it does, a particular fund, can be collaterally attacked, will be productive of confusion, *e. g.*, while decree protects the successful party so long as he is within the limits of the State, is no protection anywhere else.

> See *Green* vs. *Van Buskirk*, 5 Wall, 307;
> *Wharton's Conflict of Laws*, 3d Ed., Vol. 1, Sec. 38 *et seq.*

This doctrine is well illustrated in the leading case of *Loaiza* vs. *Sup. Ct.*, 9 L. R. A., 377, wherein the court says:

> "It (the State Court) cannot bring the person of a non-resident within its limits, its process goes not beyond its borders, but it may determine the extent of his title to real estate held within its limits, and for the purpose of such determination may provide any reasonable method of imparting notice."

If the State Court has such power with reference to real estate held by a non-resident, how much more will it have the same power with reference to *personal property* situate within its jurisdiction?

Loaiza vs. *Sup. Ct.*, 9 L. R. A., 377.

The same principle is sustained in the case of *Heidriter* vs. *Elizabeth Oilcloth Company*, 112 U. S., 301, wherein the court says that "Jurisdiction may be acquired by the mere bringing of a suit in which a claim is sought to be enforced against property situate within its territorial jurisdiction, that may be equivalent to a seizure, being the open and public exercise over it for the purpose of a suit."

In conclusion, it appearing that the Supreme Court of Florida construed a statute of that State in the case of *Rome Insurance Company* vs. *Corbett*, *supra*, having held that in the instant case,

(a) The complainant in the Circuit Court for Hamilton County has complied with all the requirements of a statute authorizing process by publication upon the non-resident defendant;

(b) The statute under which the suit was filed and publication issued, was broad enough to cover the case at bar, and

(c) The proceeding was not a suit in *personam* but one in which a decree confining and limiting its operation to the *res* or fund before the Court would be upheld;

We respectfully submit that in the light of the authorities *supra*, the decision of the Florida Supreme Court is binding and conclusive upon this honorable Court.

III.

Specifications of Errors No. 3

We come now to the question of whether or not the respondent has entered its appearance so as to give jurisdiction to the Circuit Court for Hamilton County in the original proceeding. We are not unmindful of the fact that if this were a question wherein jurisdiction of

the person alone was involved, that the plaintiff in error might not be held to have waived his right to object to the jurisdiction of the Court by appearing in the Court of original jurisdiction, but no such question is here involved: we are simply concerned with the construction of a State statute, of property, and of a cause of which the State Court had original jurisdiction, and the rules of practice and statutes governing that Court will be observed and followed by a Federal Court.

It appears by the transcript of the record in this cause that although the respondent as defendant in the Court of original jurisdiction, filed a special appearance denying jurisdiction, he confined his appearance to the question of the right to service by publication alone, and after this question had been decided adversely to it, an appeal was prosecuted to the Supreme Court of the State of Florida.

See

Rome Insurance Company vs. *Corbett*, 66 Fla., 438.

That taking an appeal from a decree is an appearance so as to confer jurisdiction upon the person of the defendant has been repeatedly adjudicated by the Supreme Court of Florida.

Drew Lbr. Co. vs. *Walter*, 45 Fla., 252; 34 Sou. Rep. 244;
Barwick vs. *Rouse*, 43 Sou. Rep. 753;
Hayman vs. *Weil*, 44 Sou. Rep., 176;
Rumeli vs. *City of Tampa*, 48 Fla., 112; 37 Sou. Rep. 563.

An Appeal Operates as an Appearance:

In the case of *Stovall* vs. *Stovall*, 39 S. W., 416, the Court said:

> "The rule is established, that notwithstanding jurisdiction of the person can be acquired only by actual service or by a voluntary appearance, if a

defendant appears and raises the question of jurisdiction over him by showing that no process has been served on him, if the court agrees with him and sustains his motion he is not before the court, but if the court holds against him and on appeal reverses the lower court, then he is before the court by reason of such appeal, and the court has acquired jurisdiction."

The same rule is applicable in the case of a party prosecuting a writ of error, citing,

Taylor vs. *Sledge*, 110 Tenn., 263;
Wilson vs. *Brandenburg*, 16 Ark., 646;
Wylly vs. *Sanford L. & T. Co.*, 44 Fla., 818; 33 Sou. 453.

In the case of *Taylor* vs. *Sledge*, above cited, where the Court of Tenn. says:

"He," referring to the plaintiff in error in that case, "had two remedies to correct any error committed against him. If there was error in the fact of the record, he could have the judgment reversed upon writ of error from this court. If there was no jurisdiction of his person, the judgment was absolutely void and he could have had it so decreed, and its collection enjoined, by proper proceedings in the Chancery court. It was his right and his duty to chose between the two remedies. He could not have both, because a party is entitled to only one trial in court; the policy of the law being to prevent multiplicity of suits and to put an end to litigation. It is immaterial that the two remedies are not equally broad as the defendant is not bound to adopt the one that is less effectual, etc. It is accordingly held, in harmony with the reported cases, that where an appeal is taken for the purpose of obtaining a trial *denovo* in the appellate court the appellant submits himself to the jurisdiction of that court, and can not take advantage of any irregularity in the service of the original summons."

We find that there are 22 States which hold that an appeal operates as a general appearance and among these

is the Supreme Court of the State of Florida where we have no statute holding that a special appeal may be taken.

The leading case in Florida, or we might say, the case that is parallel with the one at bar is the case of *Wylly* vs. *Sanford Loan & Trust Co.*, above cited, wherein the Supreme Court of Florida says: (Second head note) "An appeal to this court operates as an appearance in the cause, which will permit the court below, after reversal, to proceed with the case."

Opinion by Maxwell, *J.*:

> "This cause was referred by the court to its late commissioner, who reported it for reversal.
>
> "A bill for foreclosure of mortgage was filed by appellee (complainant below) against appellants, and service of process upon defendants, attempted by publication. Decree *pro confesso* was entered against defendants, followed by a final decree of foreclosure. From this decree, defendants, who had not appeared in the court below, appealed to this Court, assigning as error various alleged irregularities in the service of process upon them by publication.
>
> "In order that the court should acquire jurisdiction of non-resident defendants by constructive service of process by publication, it is necessary that the provisions of the statute authorizing such service be strictly and accurately pursued. *Shrader* vs. *Shrader*, 36 Fla., 502.
>
> "One of the requirements of our statute is that the Clerk 'shall also within twenty days of the making of the order' for publication 'send by mail a copy to the defendant, if his residence be shown by the bill or affidavit.' Rev. Statutes 4, 1113, 2. Chap. 4129, Acts 1893.
>
> "In this case there were two defendants, both non-residents, and the certificate of the Clerk filed, as required by Sec. 1145 Rev. Statutes, is that he 'mailed copies of said order to the address of defendant as given in the affidavit of complaint.' This shows at best service upon one only of the defendants, and the

uncertainty upon which of them such service was made renders it *primafacie* void as to both (several cases cited). The decree of the court below, therefore was rendered against parties of whom the court is not shown to have acquired jurisdiction, and must be set aside.

"The appeal of the defendants operated as an appearance in the cause, however, which will enable the court below now to proceed in the matter. *Stanley* vs. *Arrow* and *Finlason* vs. *Lipscomb*, *supra*.

"The decree is reversed and the cause remanded with directions to vacate the decree *proconfesso* heretofore entered against the defendants, and for further proceedings in accordance with law."

An examination of the decisions of other jurisdictions will show wherever this question has been presented and decided in a well considered case, a like conclusion has been reached by the Court, e. g., in the case of *Tootle* vs. *McClellan*, 103 S. W., 766, plaintiff brought an action in the United States Circuit Court for the Northern District of Indian Territory, upon a judgment obtained in a State Court of Missouri. In the State Court McClellan appeared specially to quash service of summons as fraudulent on the ground that he was not properly within the jurisdiction of the court; the State Court heard the application and denied it. McClellan, however, did not appear or plead, whereupon the Missouri State Court granted judgment against him by default. It was held by the United States Circuit Court that the defendant could not dispute the validity of the judgment inasmuch as the precise question he tried to raise in the United States Circuit Court had been submitted to and determined by the State tribunal.

The facts in this case are identical with the case at bar, and the defendants in the District Court raised the question by a plea of *res judicata*, the averments of which were not challenged by the plaintiff, but the precise question

previously adjudicated in the State court was sought to be raised in the form of a replication to the plea.

Again, in the case of *Capwell* vs. *Sipe*, 51 Fed. Rep., 667, plaintiff sued on a judgment rendered in Rhode Island. The defense was that the defendants had been personally served in Rhode Island while they were there for the sole purpose of attending trial of another suit. They pleaded this fact in abatement but the State Court overruled the plea. It was held that the decision of the Rhode Island Court on this question was conclusive. This case was affirmed in 59 Fed., 970.

In *Kellogg* vs. *Maloney*, 152 Federal, 405, plaintiff brought ejectment in the Circuit Court of the United States. An action had been previously brought in the State Court to foreclose a tax lien. The defendant in the foreclosure suit appeared specially just as the plaintiff in error did in the instant case, to quash the summons, which motion was denied by the State Court. He failed to plead and judgment by default was entered. He then brought the same action in the United States Circuit Court against Maloney, who held title under a deed from the purchaser at the foreclosure sale. In affirming the Circuit Court, the Federal Circuit Court of Appeals decided adversely to Kellogg, holding "that the plaintiff in error cannot again litigate the same question in any court is clear."

In *Hubbard* vs. *American Investment Company*, 70 Fed., 808, plaintiff brought his action on a judgment in the District Court of Colorado. In the State Court action the defendant had entered a special appearance and moved to quash the proceeding on the ground that there was no legal service upon him. The State Court heard his motion and denied it; judgment was then entered in the State Court against him, and the present action on said judgment was brought in the U. S. Circuit Court. The Court in excluding testimony offered by the defendant to show that

the person served with summons was not his agent, held: "the question of jurisdiction has been once heard and determined, and this Court cannot sit as an appellate tribunal to determine the correctness of the Colorado Court upon this case."

See also to the same effect.

Ferguson vs. *Crawford*, 70 N. Y., 254;
Plant vs. *Harrison*, 36 Misc., 249;
Bailey vs. *Wilson*, 52 Misc., 642;
Anæman vs. *Dueker*, 25 Pac., 582.

We have read with interest the argument of counsel for plaintiff in error that the Florida Court in its decisions touching this question proceeded upon the theory that in every adjudicated case there has been a voluntary appearance, and stress is laid by counsel upon this point. We must confess that we see no reason for such a construction; in particular as the facts of the adjudicated cases will show that in every case the litigant in appealing to the Supreme Court of Florida has sought to avoid its assumption of jurisdiction over his person in the same manner as the plaintiff in error has done in the instant case.

As previously stated in this brief, there is nothing in the record to show that the action of the respondent in applying for relief against an alleged unauthorized intervention, and having thereby invited the decision of the Florida Court upon the merits of his application, did so involuntarily, because if his contention be correct, the action of the Florida court was a nullity and he was not bound to appear therein.

Having invited the decision of the Court in this manner, he is bound by its adverse decision to him. He cannot inject the same issues into an action brought in the United States District Court for the perfectly obvious reason that that Court cannot act as an appellate court to review the decision of the Florida Court.

Again, respondent seeks to justify its action in appealing by designating its action as a special appeal.

Upon reading the statute of Florida giving the right to appeal both as to final and interlocutory decrees, it is apparent that there is no provision of law in this State authorizing a special appeal. The sole case to which our attention has been called specifically authorizing what is termed a "special appeal" is the case of *Freer* vs. *White*, 51 N. W., 807, cited on page 49 of the brief of plaintiff in error. We have examined this decisioon, and have also examined the law with reference to the special appeal referred to, and we find that this form of appeal is authorized by a statute in the State of Michigan, to-wit, Section 5432, Compiled Laws. An examination of the reported case of *Rome Insurance Company* vs. *Corbett*, 63 Sou. Rep., 834, will also disclose that the Supreme Court of Florida denies the existence of the right to special appeal of the character urged by the plaintiff in error.

Rome Ins. Co. vs. *Corbett*, 63 Sou. Rep., 834.

Further than this, we find the plaintiff in error in the State Court procuring a stay of proceedings, and we find no authority for his contention that having appeared and filed a stipulation in the lower court, procuring thereby an advantage, such action is not an appearance (see par. 4 final decree R., page 14).

It is true, it attempts to limit the stipulation by reciting therein that it shall not be construed as a voluntary appearance, but our concern is not what the plantiff in error might have intended, but with the legal effect of its act. That obtaining such a benefit is an appearance.

See

Insurance Company vs. *Swineford*, 28 Wis., 257.

A special appearance cannot be made in the appellate court.

Gage vs. *Merryatt*, 23 Pac., 337.

The foregoing is substantially the brief presented by counsel for petitioner in the Circuit Court of Appeals. We desire to add a few observations in support of the petition, which we deem proper by reason of the language of honorable Circuit Court of Appeals in its judgment.

A reference to the decision of the Circuit Court of Appeals, (trans. p. 94, Sec. 138) will show that the following language is employed, to-wit:

> "The Circuit Court of Hamilton County proceeds to final decree in the case of *Corbett* vs. *First National Bank of Jasper, et al.*, upon the theory that there *was a res* in which the non-residents were interested, in the *control* of the *court*, and the Supreme Court of Florida on appeal took the *same view* and sustained the constructive service upon the non-residents upon that idea."

We are unable to conceive of a more clear and unambiguous admission that the court of original jurisdiction—the Circuit Court of Florida—by its decree determined there *was a res* within its jurisdiction upon which by valid constructive service it acquired jurisdiction of the subject matter and person of the defendant for the purpose of determining the status of the *res*, and that the highest court of the State of Florida, having by its decree taken the same view, and made the same finding, the case comes within the well established principle of law that the decision of the highest court of a State becomes the law of that State, and the lower courts of that State must follow such decision.

There was, therefore, nothing left for the Circuit Court of Hamilton County to do but to accept the mandate of

the tribunal of final appellate jurisdiction as the law of that State, and proceed to final decree.

Now when the honorable Circuit Court of Appeals in the decision quoted *supra* finds that it was upon the theory that there was a *res* in the jurisdiction that the two Florida courts acted, and then further determines that the Supreme Court of Florida was wrong in its conclusions, we respectfully submit that the decision of the said Circuit Court of Appeals in its last analysis is nothing less than a reversal of the Supreme court of Florida.

"If the question is one of jurisdiction and depends on some local law or statute, and is presented to and decided by the court rendering the judgment, such decision is binding on the Federal courts."

Hubbard vs. *American Inv. Co.*, 59 Fed., 970;
Colt vs. *Colt*, 11 U. S., 556;
Duncan vs. Gegan, 25 Law Ed. U. S., 875;
Phelps vs. *Mutual Reserve Fund Assn.*, 142 Fed., 458.

It appears that when the Act of Congress proposing the creation of the Circuit Court of Appeals was presented, and during the debate thereon, it was suggested with much vigor by opponents of the measure that just such cases as the instant case would arise wherein the Circuit Court of Appeals would assume jurisdiction, which in effect would amount to appellate jurisdiction over the State tribunals.

That this case is a most important one, not only to the litigants involved, but as a precednt in future litigations, is manifest when we consider:

1. The Circuit Court of Appeals by its decree determines that a certain certificate of deposit held by the First National Bank of Jasper, Florida, is a valid evidence of indebtedness, although the Circuit Court of Hamilton County, a court of general jurisdiction, pursuant to

a mandate of the Florida Supreme Court in the Corbett case, *supra*, has proceeded to final decree and found as a fact,

"It is of no effect as having been procured by the fraud, deceit, covin and guile of the said Rome Insurance Company, and its trustee, the said American Bank and Trust Company (p. 23 trans.) and petitioner is enjoined from paying the proceeds of the same," and that final decree of said Circuit Court of Hamilton County, Florida, has never been appealed from by the respondent, although according to the finding of the Florida court, the respondent was before the court as an actor, submitted to its jurisdictioon.

The said Circuit Court of Appeals further in its decision erroneously assumes that the plea of *res judicata* filed by petitioner in the lower court and against which no attack was made as to its sufficiency by respondent is not in bar of the right of respondent to try out in the common law action the personal liability of the bank that issued the certificate.

We do not deem it necessary to cite authorities in reference to this proposition because in our opinion the decision is erroneous in that it attempts to give vitality to and permit the respondent to come into a common law court with a cause of action, to-wit, the same certificate of deposit found by the court of Hamilton County and affirmed by the Supreme Court of Florida as being a *res* within the jurisdiction of the court when this same cause of action had been previously adjudicated by the court having jurisdiction of the parties and subject matter to be a nullity and obtained through fruad.

In conclusion, we deem it proper only at this time to call the attention of this honorable Court to the fact that there were four cases pending in the Circuit Court of Appeals, two of which by order and decree of this honor-

able Court, as communicated to us, by the clerk thereof, have been consolidated and one record permitted to be used for both cases. The two cases are numbered 371 and 372, respectively, and a stipulation that the judgment of this honorable Court in case No. 372 be also entered in No. 371 has been duly filed.

The other two cases referred to are represented by Mr. Frank Fleming, Nos. 271 and 272.

We respecfully submit that in view of the law herein stated the decision of the honorable Circuit Court of Appeals should be reversed.

Respectfully submitted,

WILLIAM WADE HAMPTON,

Attorney for Petitioner.

H. S. HAMPTON and SANDFORD & HAMPTON,

on the Brief.

FILED
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WM. R. STANS
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In The Supreme Court of the United States

October Term 1921

No. 77

THE BANK OF JASPER, a Corporation,
Petitioner,

VERSUS

THE STATE BANK OF ROME, GEORGIA,
a Corporation,
Respondent.

BRIEF FOR PETITIONER ON WRIT OF CERTIORARI

F. P. FLEMING,
C. SEATON FLEMING,
Attorneys and of Counsel for Petitioner.

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In the Supreme Court of the United States

October Term 1921

No. 77

THE BANK OF JASPER, a corporation,
Petitioner,
vs.
THE STATE BANK OF ROME, GEORGIA, a corporation,
Respondent.

BRIEF FOR PETITIONER ON WRIT OF CERTIORARI

STATEMENT OF THE CASE

The Respondent, which was the original plaintiff, instituted this suit against the Petitioner, which was the original defendant, in the United States District Court for the Southern District of Florida, on the 27th day of January, 1913, on two certificates of deposit (numbered 320 and 321) (Transcript, pp.

3-6) alleged to have been issued by Petitioner to the American Bank and Trust Company, Trustee, and subsequently endorsed to it individually. After the institution of this suit the name of the American Bank and Trust Company was changed to the State Bank of Rome, which is the respondent here (Transcript, p. 61). The jurisdiction of the trial court was based on diversity of citizenship. (Transcript, p. 3). A judgment was entered in the said District Court in favor of the Petitioner on the 9th day of January, 1919. (Transcript, p. 62). From said judgment said Respondent sued out a writ of error to the United States Circuit Court of Appeals for the Fifth Circuit, which Court on the 10th day of March, 1920, reversed the judgment of the said District Court. From said judgment of said Circuit Court of Appeals, Petitioner sued out a Petition for Writ of Certiorari to this Honorable Court, which was granted on the 15th day of October, A. D. 1920.

Prior to the institution of this action in the United States District Court as aforesaid, on to-wit, the 3rd day of January, A. D. 1913, there were filed in the Circuit Court, in and for Hamilton County, Florida, a court of general jurisdiction, bills of complaint by W. S. Murrow and G. R. Brown, in separate suits, against Rome Insurance Company, American Bank and Trust Company, original plaintiff in this suit, and against your petitioner (Transcript, pp. 7-10), praying that certain certificates of deposit, (being the same certificates of deposit sued on in this cause) be declared to be null and void; that the contracts of sale of certain stock by

reason of which said certificates were issued be decreed null and void and certain notes given by complainants to petitioner pursuant thereto, and the basis of said certificates, be cancelled and surrendered (Transcript, pp. 9 to 15).

It was alleged in said bill of complaint that the said certificates of deposit were issued by the respondent based on certain notes issued by the complainants to the order of petitioner pursuant to a contract of sale of stock of the Rome Insurance Company; that said contract was fraudulent; and that the proceeds of said notes remained in the hands of petitioner (Transcript, pp. 8, 9).

In said suits in the said Circuit Court in and for Hamilton County, Florida, service of process was had upon American Bank and Trust Company, (the original plaintiff herein) by publication under the provisions of Section 1866 General Statutes of Florida, Section 3111, Revised General Statutes of Florida (year 1920) (Transcript, pp. 11, 14, 32). Your petitioner, a resident of the State of Florida, was personally served with process.

Upon the return day fixed in this order of publication American Bank and Trust Company (original plaintiff here) filed special appearances and motions to quash the service (Transcript, pp. 23, 24, 55 and 56), which motions were in substance confined to the one ground that the proceedings brought in the State Court were actions in personam and that there had been no personal service on said American Bank and Trust Company. These motions having come on to be heard before the Circuit Court of

Hamilton County, Florida, said Court on the 14th day of March, and the 3rd day of April, 1913, denied similar motions in a companion case, B. F. Carter vs. Rome Insurance Company, (Transcript, pp. 35 and 42).

Thereupon, on the 10th day of April, A. D. 1913, stipulations were entered into between solicitors for the respective parties in the suits in the State Courts, (Transcript, pp. 25, 57) providing that all proceedings in said suits be stayed pending the prosecution of an appeal to the Supreme Court of Florida in the case of B. F. Carter vs. Rome Insurance Company, et als, which appeal was from said orders of the State Court denying similar motions to quash service by publication on similar grounds, and it was further provided in and by said stipulations that the ultimate decision of the said appeal in said case of B. F. Carter vs. Rome Insurance Company, et als., would be decisive of the validity of the service by publication on the defendant in those suits, and if the service in the said Carter case be ultimately held defective and ordered quashed then the service in the other cases shall be held defective and shall be quashed.

The Circuit Court of Appeals in its decision, (Transcript, p. 72) stated that there was a stipulation in the State Court, meaning the State Trial Court, that the supersedeas should not constitute a general appearance. There is no basis for such statement, nor are there any facts in the case from which such a statement is inferable. All that the stipulation provided for was that the *notice* of ap-

plication for an order granting and fixing the terms of a supersedeas by the State Trial Court, should not operate as a general appearance (Transcript, p. 45). There is no stipulation directly or inferentially providing that either the supersedeas or appeal should not operate as a general appearance.

The other stipulation entered into in the State Trial Court, in each of the said chancery suits brought by said W. S. Murrow and G. R. Brown, respectively, (Transcript, pp. 55 and 57) providing for a stay of proceedings in those suits, pending appeal in the case brought by said B. F. Carter and making the issue of service in such cases dependent upon the decision of the B. F. Carter case, provide only that the stipulation as such shall not constitute a general appearance. Petitioner has never contended that such stipulation was a general appearance, but only that the appeal constituted the general appearance. The effect of such appeal was never avoided or attempted to be avoided by stipulation.

At the June term, 1913, of the Supreme Court of Florida, that Court affirmed the order of the lower court in the case of B. F. Carter vs. Rome Insurance Company, et als., which decision is set forth in full (Transcript, p. 52). The service by publication was not held defective and was not quashed.

The decision of the Supreme Court of the State of Florida in Rome Insurance Company, et als., vs. J. H. Corbett, a companion case, on the authority of which, said case of Rome Insurance Company, et

als., vs. B. F. Carter was decided, is set forth in full (Transcript, pp. 53 and 54).

Thereafter, American Bank and Trust Company took no further part in the proceedings in the State Court, and on the 14th day of July, 1914, final decrees were entered in the State Court (Transcript, pp. 11 to 17), which decrees adjudged that the certificates of deposit therein mentioned, (being the same certificates of deposit herein sued upon) were void and of no effect and enjoined your petitioner from paying the proceeds of said notes to American Bank and Trust Company, or to anyone for it.

Following the decrees of the Circuit Court of Hamilton County, Florida, your petitioner filed pleas of res adjudicata, (Transcript, pp. 7 to 10) in this suit setting up the decrees entered in the Circuit Court in and for Hamilton County, Florida, which decrees adjudged the certificates of deposit herein sued upon to be void and of no effect, and which enjoined your petitioner from paying the proceeds thereof to the plaintiff below or to anyone for it. Certified copies of said decrees were attached to said pleas, (Transcript, pp. 11 to 17).

To these additional pleas the plaintiff in the trial court (the respondent here), filed a demurrer (Transcript, p. 17), which demurrer was overruled (Transcript, p. 19). Thereupon respondent filed replications to said pleas, (Transcript, pp. 21 to 57), setting up in substance by said replications that the chancery suits mentioned in your petitioner's pleas (Transcript, pp. 7 to 17), were actions in personam; that no personal service was ever had

on said respondent; that it did not at any time or in any manner appear in said suits, except specially to contest the service by publication therein made, and that it in no way waived the want of jurisdiction of the State Court over its person. There were attached to said replications a copy of the record in the said chancery suit of B. F. Carter vs. Rome Insurance Company (Transcript, pp. 26 to 54).

Petitioner filed a motion to strike (Transcript, p. 58) and a demurrer, (Transcript, pp. 58 and 59) to said replications, which demurrer was sustained, (Transcript, p. 60).

Thereupon, upon respondent's withdrawing all its pleas except the additional pleas setting up res adjudicata plaintiff in the trial court (the respondent here) filed a declination to plead further (Transcript, pp. 60 and 61), and final judgment was entered in favor of your petitioner, (Transcript, p. 62).

From said judgment, said plaintiff (the respondent here) sued out a writ of error to the Circuit Court of Appeals of the United States for the Fifth Circuit which Court on the 10th day of March, 1920, reversed the judgment of the District Court, (Transcript, pp. 70 to 77) holding in effect:

(a) That the Circuit Court in and for Hamilton County, Florida, acquired no jurisdiction over the person of the respondent, The First National Bank of Rome, by the service by publication made in said suits.

(b) That said Circuit Court in and for Hamilton County, Florida acquired no jurisdiction over

the fund or res sought to be impounded in said chancery suits, as the same was not under the control of the Court.

(c) That the Florida Court had no jurisdiction to render the said decrees as to non-residents.

(d) That the said Court did not purport to determine the personal liability of your petitioner to the plaintiff on the said certificates of deposit.

(e) That the prosecutions of the appeals by respondent to the Florida Supreme Court, did not amount to general appearances in the State of Florida.

SPECIFICATIONS OF ERROR

First: Your petitioner represents unto this Honorable Court that the aforesaid judgment of the United States Circuit Court of Appeals for the Fifth Circuit is erroneous in this: it presents a conflict of State and Federal jurisdiction and in effect reverses the decision of the Supreme Court of the State of Florida in the case of Rome Insurance Company, et als., vs. B. F. Carter (63 Sou. 834; Transcript, p. 52) and Rome Insurance Company et als., vs. J. H. Corbett (63 Sou. 833; Transcript, pp. 53 and 54) and denies them full faith and credit, for the following reasons:

(a) The United States Circuit Court of Appeals held that the prosecution of the appeals in the State Court did not amount to general appearances, whereas, The Florida Supreme Court, following the established rule of practice in that State,

held that the prosecution of an appeal constitutes a general appearance in the lower court.

(b) The Florida Supreme Court held that the service by publication upon the respondent, American Bank and Trust Company, original plaintiff in this action, was valid so as to bring its person within the jurisdiction of the Court for the relief prayed in the bills of complaint. The Circuit Court of Appeals held otherwise.

(c) The Florida Supreme Court held that the bills of complaint confined their prayers to an adjudication of a fund sought to be impounded, and that said fund was within the jurisdiction and control of the State Court. The Circuit Court of Appeals held the contrary.

Second: Your petitioner further represents that said judgment of the United States Circuit Court of Appeals for the Fifth Circuit is erroneous on the following grounds:

(a) The fund impounded by the decree in the State Court had its situs in the State of Florida, and not in the State of Georgia; because:

(aa) The money was not to be payable except "on the return of this certificate properly endorsed."

(bb) The certificate was not subject to check.

(cc) The deposit was made for a specific purpose and was not the part of a general fund.

(dd) The situs of a debt for the purpose of administration, is the home of the debtor.

(b) The proceedings in the State Court, the decrees in which were set up as a defense by your

petitioner in the District Court, were proceedings in rem, to the validity of which personal service is unnecessary.

(c) If any defects existed in the State Court's jurisdiction over American Bank and Trust Company (the respondent here) such defects under the rulings of the Supreme Court of Florida were waived by the prosecution of the appeals to the Florida Supreme Court.

(d) The decrees relied upon (Transcript, pp. 11 to 17) declared the certificates of deposit herein sued upon to be void and of no effect.

Third. Your petitioner further represents that no question was raised by the plaintiff, (the respondent here) either in the District Court or in the Circuit Court of Appeals as to the sufficiency of your petitioner's pleas of res adjudicata, except that the proceedings in the State Court were actions in personam and that no personal service was had on the plaintiff (the respondent here) one of the defendants in those proceedings. The Court of Appeals committed an error in considering and passing upon questions not raised in the trial court and not called directly to its attention.

Fourth. Your petitioner further represents that the said United States Court of Appeals for the Fifth Circuit, committed error in denying to your petitioner the benefit of the adjudication of the Supreme Court of Florida of a statute of that State and thereby assumed a jurisdiction which not even the Supreme Court of the United States has power to assume.

ARGUMENT

The petitioner in its argument expects to establish the following:

A. Federal Courts must recognize and apply rules of the State Courts concerning matters of procedure.

B. In Florida, the prosecution of appeals constitute general appearances.

C. The proceedings in the State Court were proceedings in rem, and personal service was unnecessary.

D. The decrees entered in the State Court constituted a complete defense to this action brought in the Federal Court.

A — FEDERAL COURTS MUST RECOGNIZE AND APPLY RULES OF STATE COURTS CONCERNING MATTERS OF PROCEDURE.

In considering the legality and effect of proceedings in State Courts, Federal Courts are not to be governed by their own rule of procedure, or by general rule in other jurisdictions, but must apply and be governed by the rules of procedure of the State in which the proceedings were brought. It is an elementary proposition that matter of procedure is governed by the lex fori.

In York vs. Texas, 137 U. S., 15, 34 L. Ed. 604, this principle was clearly recognized. The facts of the case as well as the holding of the Court, appear in the following excerpt from the opinion:

> "It was conceded by the district and the supreme courts that the service upon the defendant in St. Louis was a nullity, and gave the district court no jurisdiction; but it was held that, under the peculiar statutes of the State of Texas, the appearance for the purpose of pleading to the jurisdiction was a voluntary appearance, which brought the defendant in to court. Plaintiff in error questions this construction of the Texas statutes, but inasmuch as the Supreme Court, the highest court of the State, has so construed them, such construction must be accepted here as correct, and the only question we can consider is as to the power of the State in respect thereto."

The York case has been followed and the rule approved and applied in the following decisions:

Missouri etc. Ry. vs. Goodrich, 234 U. S. 1429; 58 L. Ed. 1578.

Missouri etc. Ry. vs. Goodrich, 229 U. S. 607; 57 L. Ed. 1349.

Kauffman vs. Wooters, 138 U. S., 287; 34 L. Ed. 962.

McLaughlin Brothers vs. Hollowell, 228 U. S. 289; 57 L. Ed. 840.

Western Ind. Co. vs. Rupp, 235 U. S. 261; 59 L. Ed. 220.

In the last case cited it was said:

> "That a state, without violence to the 'due process' clause of the 14th Amendment, may declare that one who voluntarily enters one of its courts to contest any question in an action there pending shall be deemed to have submitted himself to the jurisdiction of the court for all purposes of the action, and may attach consequences of this character even to a special appearance entered for the purpose of objecting that the trial court has not acquired jurisdiction over the person of the defendant, is settled by the decision of this court in York v. Texas, 137 U. S. 15, 34 L. Ed. 604, 11 Sup. Ct. Rep. 9; followed in Kauffman v. Wooters, 138 U. S. 285, 34 L. Ed. 962, 11 Sup. Ct. Rep. 298."

Elaborating on the principles underlying this rule, the opinion continues:

> "The 14th Amendment declares that no state shall 'deprive any person of life, liberty,

or property without due process of law.' This prohibition has regard not to matters of form, but to substance of right. Since its adoption, whatever was the rule before, a non-resident party against whom a personal action is instituted in a state court without service of process upon him may, if he please, ignore the proceedings as wholly ineffective, and set up its invalidity if and when an attempt is made to take his property thereunder, or when he is sued upon it in the same or another jurisdiction. Pennoyer v. Neff, 95 U. S. 714, 732, 733, 24 L. Ed. 565, 572; York v. Texas 137 U. S. 15, 21, 34 L. Ed. 604, 605, 11 Sup. Ct. Rep. 9. But if he desires to raise the question of the validity of the proceeding in the court in which it is instituted, so as to avoid even the semblance of a judgment against him, it is within the power of the State to declare that he shall do this subject to the risk of being obliged to submit to the jurisdiction of the court to hear and determine the merits, if the objection raised to its jurisdiction over his person shall be overruled. This prevents a defendant from doing what plaintiff in error has attempted to do in the present case; that is, to secure, if possible, the benefit of a binding adjudication in its favor upon the merits, through the exercise of the court's jurisdiction, while depriving its adversary of any possibility of success by reserving an objection to the jurisdiction of the court to render any judgment against it."

The identical situation presented by the record herein existed in the case of Foster Milburn Co. vs. Chinn (C. C. A. 2nd Circuit) 202 Fed. 175, where the Court said:

"It is certainly the general rule of the federal courts that an objection once taken to the jurisdiction is not waived by the defendant's subsequently answering and taking part in the trial. Harkness v. Hyde, 98 U. S. 476, 25 L. Ed. 237. It is also true that the defendant may attack a judgment of the court of another state for lack of jurisdiction, either appearing on the face of the record or proved by testimony. Thompson v. Whitman, 18 Wall. 457, 21 L. Ed. 897. It is, however, the law of the State of Kentucky, that though the defendant appear specially to object to the jurisdiction of the court, if he thereafter appeal to a higher court from any judgment recovered against him in the action, he ipso facto waives his objection and transforms his special into a general appearance. It is not necessary for us to determine whether the service of process upon Monroe, as managing agent, was good or bad. We are obliged under Section 905, U. S. Rev. St. (U. S. Compt. St. 1901, p. 677) to give full faith and credit to the judgment; that is to say, the same faith and credit it would have 'by law or usage' in the state of Kentucky. So doing, we must treat the defendant as having appeared generally. The trial judge was right in holding that a usage established by the decision of the highest courts of Kentucky is to be given the same effect as if established by statute. In the latter case the Supreme Court has held that such a rule is binding in a suit upon a judgment in the courts of another State. York v. Texas, 137 U. S. 15, 11 Sup. Ct. 9, 34 L. Ed. 604."

On page 31 of respondent's brief in opposition to application for certiorari (filed October Term,

1920) is cited the case of Harkness vs. Hyde, 98 U. S. 476, 25 L. Ed. 237, as authority for the proposition that "Illegality in a proceeding by which jurisdiction is obtained is not waived by the appearance of the defendant for the purpose of calling the attention of the court to such irregularity."

The case cited has no bearing on the points involved here. Petitioner is not arguing that the mere appearance for the purpose of objecting to the court's jurisdiction amounts to a general appearance. Our position is that the prosecution of the appeal amounted to such a participation in the proceedings as to amount to a general appearance.

Furthermore, the Harkness case does not touch upon the rule laid down in York vs. Texas, 137 U. S. 15, 34 L. Ed. 604, which admitted that the rule in the Federal Court was as stated in the Harkness case, but held that where the State Supreme Court had held certain acts to constitute a general appearance, the Federal Courts were bound to follow the rules of the State courts.

None of the cases cited in respondent's said brief (filed October Term, 1920) meet this proposition. We later cite cases in this brief to show that in Florida the undoubted rule is that an appeal amounts to a general appearance. This being a matter of procedure, the Federal courts must apply the same rule.

For the above reason, the following cases cited by respondent in its said brief at pages 20, 30 and 31, respectively, are absolutely not in point:

Davis vs. C. C. C. & St. L. R. Co., 217 U. S., 157, 54 L. Ed. 708.

Pugh vs. Loisel, 219 Fed. 417 (5th Cir. C. C. A.)

Smith vs. Gov. of Canal Zone, 249 Fed. 273, (5th Cir. C. C. A.)

In the matter of Indiana Transp. Co. 244 U. S. 456; 61 L. Ed. 1253.

All the Federal cases cited by respondent are cases in which the question of jurisdiction arose in the lower Federal Court. York vs. Texas, 137 U. S. 15, 34 1 Ed. 604, holds that regardless of the rule in Federal Courts, a rule of practice in a State Court will be followed by the Federal Court, as the State has full power over procedure in its courts, and further holds that a rule that a qualified appearance is a waiver of defects in jurisdiction is not a denial of due process of law.

B—IN FLORIDA, THE PROSECUTIONS OF APPEALS CONSTITUTE GENERAL APPEARANCES.

In determining, then, the legality of the proceedings in the State Court, the Circuit Court of Appeals erred in not giving full faith and credit to the judgment of the Florida Supreme Court, which considered that the appeal waived the objections to the service. The rule in Florida is well settled that the prosecution of an appeal constitutes a general appearance, and the Circuit Court of Appeals should have applied this rule.

The Florida rule is stated and applied in the following decisions:

Tunno and Jessup & Co. vs. Robert, 16 Fla. 738.

Standley vs. Arnow, 13 Fla., 361.

Henry vs. Spitler, 67 Fla., 146, 64 So. 745.

Busard vs. Hutson, 65 Fla., 479, 62 So. 483.

Parnick vs. Rouse, 53 Fla., 643, 43 So. 753.

Hayman vs. Neil, 53 Fla., 127, 44 So. 176.

Rumeli vs. Tampa, 48 Fla., 112, 37 So. 563.

Wylly vs. Sanford, L & T Co., 44 Fla., 818, 33 So. 453.

Schrader vs. Schrader, 36 Fla., 502.

Rome Ins. Co. vs. Corbett, Transcript herein, p. 82.

The Circuit Court of Appeals in its decision (Transcript, p. 74) stated that "The rule in Florida, differing from that which obtains in the Federal courts, is to the effect that an appellant, though objecting to the insufficiency of service successfully, is considered in Court upon the return of the case to the lower court." On the same page of its opinion the Court of Appeals conceded that "this court will follow the rule of decision in the State Court in passing upon a judgment in that Court."

But the Circuit Court of Appeals failed to follow the State rule of decision on the ground that it was not applicable to an appeal from an interlocutory order of the Court, as distinguished from a final decree. Such a distinction is not made by the Florida Courts. The Florida Courts have always used the word "appeal" and have not limited it to the character of the appeal. It was made only by the United States Circuit Court of Appeals, which applied *its own rule of decision* instead of that of the Florida Court.

The Supreme Court of Florida indicated very plainly that the rule was applicable in the *same proceedings* considered by the Court of Appeals.

In the case of Rumeli vs. Tampa, 48 Fla., 112, 37 So. 563, it appeared that the error complained of was an interlocutory order, that of the entry of a decree pro confesso. The Supreme Court of Florida reversed the final decree on the ground that the entry of decree pro confesso was erroneous because the Court did not have jurisdiction of the defendant but held that by the appeal the defendant was then in

Court. The sole contest was whether the Court had jurisdiction of the defendant, not on the merits, and it would be idle mockery to say to the defendant, you appealed from the final decree entered on a void decree pro confesso, assigning as error the entry of the interlocutory decree pro confesso and you are therefore in Court, but had you appealed from the decree pro confesso your appeal would not have constituted an appearance. The Court makes no such distinction.

In the case of Tunno and Jessup & Co. vs. Robert 16 Fla., 738, two appeals were presented by the appellants named from several interlocutory decrees and a final decree. There was no final decree against M. K. Jessup & Co. The Supreme Court of Florida **at page 750 of text said:**

> "We next treat the appeal of M. K. Jessup & Co. There is no decree in this record against these parties signed by the judge. There is an entry in the record ordering the bill to be taken for confessed signed by plaintiff's attorney. Anterior to this there is an affidavit by plaintiff's attorneys, that M. K. Jessup & Co. reside in New York, as shown by the return of the Sheriff, that they are not to be found in the county, and a suggestion that they reside in New York, and there is an order of publication by the judge. There is no evidence 'by affidavit to the judge' that any publication was ever made of this order. This is a requirement of the statute in order to perfect a constructive service in such cases, and it must appear in the record; nor is there any authority in such cases for an order taking the bill *pro confesso* to be

> entered by the plaintiff's attorney. It must be granted by the judge, (Thomp. Dig. 452). The persons composing the firm of M. K. Jessup & Co., having appeared upon this appeal in this court, upon the return of the cause to the Circuit Court must be considered as regularly before the court in like manner as if duly served with process. 13 Fla. 368; 1 Pike 50, 376, 386, 405; 4 Bibb 84, 167.
>
> "The decrees of the 21st day of February A. D. 1877, and of the 16th day of July 1877, and the order taking the bill as confessed against M. K. Jessup & Co. are reversed and set aside, and the case is remanded for further proceedings conformable to law and not inconsistent with this opinion."

In the above case in the appeal of M. K. Jessup & Co., there is no decree in the record against these parties signed by the judge; there is no showing of proper service by publication on said parties; there is no order by the judge taking the bill pro confesso against said parties; there is no showing of any final decree or proper interlocutory decree against said parties. Yet the Florida Supreme Court in its opinion holds: (Ibid text 151)

> "The persons composing the firm of M. K. Jessup & Co. having appeared upon this appeal in this court, upon the return of the cause to the Circuit Court must be considered as regularly before the court in like manner as if duly served with process."

In view of the facts in the above case and the opinion of the Supreme Court therein, such opinion

clearly indicates that the prosecution of all classes of appeals to the Florida Supreme Court constitute general appearances on the return of the cause to the court from which it was appealed.

In the case of Standley vs. Arnow, 13 Fla., 386, it appeared that the defendant had moved in the lower court to set aside the report of the master for want of notice of the hearing before him, and also to set aside the order Pro Confesso on the ground that she had a meritorious defense, and because no subpœna in said cause had been served upon her, which motion was overruled by the Court.

The Supreme Court of Florida held that the lower Court did not have jurisdiction of the defendant to enter a decree, and reversed the orders and decrees entered in the lower Court, but held:

> "The decree of the Circuit Court, and all other orders and proceedings therein subsequent to the return of the subpœna, must therefore be reversed, with costs; but as the appellant has made herself a party to the suit by voluntarily appearing and prosecuting her appeal, she must, upon the return of the cause to the Circuit Court, be considered as regularly before the Court in like manner as if she had been duly served with process."

The Supreme Court of Florida adopted in the case of Standley vs. Arnow, supra, the rule pursued by the Court of Appeals in Kentucky and the Supreme Court of Arkansas, saying:

> "This course has long been pursued by the Court of Appeals in Kentucky and the Supreme

> Court of Arkansas, and is adopted as a proper practice in like cases. *Vide* 1 Pike, 50, 376, 386, 405; 4 Bibb, 84, 167."

Almost similar language is used by the Supreme Court of Florida as by the Supreme Court of Arkansas. Neither makes any distinction as to the character of the appeal, but holds that such appeal is voluntary.

In the case of Gilbreath vs. Kuykendall, 1 Pike, 50, it appeared that the writ was issued in the name of the United States and not of the State of Arkansas. The process was held void, but the Court in its opinion said:

> "But as the plaintiff in error has now made himself a party to the suit by voluntarily appearing and prosecuting his writ of error, according to the rule of practice in similar cases by the Court of Appeals of Kentucky, in which we fully concur, he must, upon return of the case to the court below, be considered as regularly before the Court in like manner as if he had been duly served with process."

In the case of Murphy vs. Williams, 1 Pike, 376, it appeared that the writ was returnable to the 1838 Term, while default was entered at the 1837 Term. The default was held error, but the Court at page 385 said:

> "But as the appellant has appeared here and assigned his errors, he has become a party to the proceedings and consequently Murphy, in accordance with the rule laid down in Gilbreath vs. Kuyendall, is bound to appear in the Circuit

> Court when the same proceedings will be had in this suit, as though he was served with a valid process."

In the case of Graves vs. Hughes, 4 Bibb 84, the Court found that Graves had not been served with process, but that service was made on another person by the name of Graves, and held that jurisdiction was not acquired to enter default. The Court said:

> "The decree as to Graves is therefore erroneous and must be reversed, the cause remanded to the court below and the order taking the bill as confessed against Graves set aside, and he may have leave to answer the bill should he apply for leave to do so; but if he should not apply for leave to answer, then, as by the laws now in force, a copy of the bill need not be delivered, and as he has appeared to the cause an order again may be entered taking the bill as confessed."

Judgment by default in ejectment upon void service, was reversed in the case of Wharton vs. Clay, 4 Bibb 167, but the appeal was also held to constitute an appearance, the Court saying:

> "The judgment must therefore be reversed with costs, and the cause remanded to the Court for new proceedings, but as the tenants in possession appear now to have notice of the pending of suit, unless they should appear and plead, judgment by default may be entered."

The rule announced in Standley vs. Arnow has been adhered to by the Supreme Court of Florida.

In Shrader vs. Shrader, 36 Fla., 502, on page 518, the Court says:

> "Mrs. Shrader, the appellant in Case No. 2 having by her appeal made herself a party to such case, should proceed to plead to the bill of complaint therein. Standley vs. Arnow, 13 Fla., 361."

In Wylly vs. Sanford Loan & Trust Co., 44 Fla., 818, 820, the Court says:

> "The appeal of the defendants operated as an appearance in the cause however, which will enable the Court below now to proceed in the matter. Standley vs. Arnow, and Finlayson vs. Lipscomb, supra."

In Rumeli vs. City of Tampa, 48 Fla., 112, on page 114, the Court says:

> "The appeal of the defendant, Rumeli, operated as an appearance in the cause, however, which will enable the Court below to proceed in the matter. Wylly vs. Sanford Loan & Trust Co., 44 Fla. 818."

In the case of West Ind. Co. vs. Rupp., 235 U. S., 261, 59 L. ed. 220, at page 225 of the text, the Court said:

> "It does not appear that the Court's attention was called to any decision by the courts of Illinois placing a different construction, or indeed, any construction, upon the section in question. If such decision existed, it was incumbent upon defendant to prove it as matter of fact. We are referred to no authoritative

judicial construction of the statute in the state of its origin, nor have we searched for any, for what is matter of fact in the state court is matter of fact in this court upon review; and this applies where foreign law is in question in the state court as well as to any other issue of fact. Janley v. Donoghue, 116 U. S. 1, 6, 29 L. ed. 535, 537, 6 Sup. Ct. Rep. 242; Chicago & A. R. Co. v. Wiggins Ferry Co. 119 U. S. 615, 622, 30 L. ed. 519, 522, 7 Sup. Ct. Rep. 398."

The above is similar to the case presented by the record herein; it does not appear that any Florida decision was called to the attention of the Circuit Court of Appeals, and said court cites no Florida decision, holding that an appeal from an interlocutory order of the court does not constitute a general appearance, as distinguished from an appeal from a final decree.

There is no basis for the distinction in the Florida decisions, but on the contrary, the rule is applied, as shown by the cases cited, to appeals from final decrees, on the merits as well as jurisdictional questions.

The reason underlying the rule is the same, regardless of the nature of the order appealed from. It is, of course, that any one who so far submits himself to the jurisdiction of the courts of a state as to avail himself of the machinery of the courts to prosecute an appeal, is "in court" and he can not claim at the same time, to be "out of court," by any fiction of special appearance, or so-called "special appeal." It is not the nature of the decree appealed

from that determines the fact of appearance, but the fact of *voluntarily taking an appeal.*

Respondent claimed that the appeal in the State court was not "voluntary," but *it failed utterly to show any compulsion of any sort requiring it to resort to appellate procedure.* If it was convinced of the illegality of the service, it could have ignored the proceedings entirely as wholly ineffective, and could have set up its invalidity if and when an attempt was made to take its property thereunder.

> West Ind. Co. vs. Rupp, 225 U. S., 261, 59 L. ed. 220.
>
> Pennoyer vs. Neff, 95 U. S., 732, 24 L. ed. 522.
>
> York vs. Texas, 137 U. S. 15, 34 L. ed., 604.

The word "voluntary" has been defined by the Courts as, "done by design or intention; purposely; intentional; not accidental."

> Williams vs. United States Mutual Association, 31 N. Y. Supp. 343, 346; 82 Hun. 268.
>
> Travelers' Ins. Co. vs. Randolph, 78 Fed. 754, 762; 24 C. C. A. 305.
>
> Campbell vs. Fidelity & Casualty Co., 60 S. W. 492, 495; 109 Ky. 661.

The respondent in support of its construction of the word "voluntary" has cited in previous briefs

the cases of Craighead vs. Martin, 25 Minn., 41; Freer vs. White, 41 Mich., 74, 51 N. W. 807; and Pugh vs. Loisel, 219 Fed., 417, 424; to the effect that the effect of appearing to contest jurisdiction cannot be regarded as a voluntary appearance in the cause. This rule is true in Florida in so far as the original Court is concerned and is so specifically held in the case of Standley vs. Arnow, supra, where the Florida Supreme Court, speaking of the proceedings in the lower Court, stated:

> "But where a party appears and questions the jurisdiction by motion based upon an alleged defect of jurisdiction, it would be a violent presumption to say that he consents by objecting."

Yet, we have seen that the Supreme Court of Florida in that very case held that the taking of an appeal to the Supreme Court did constitute an appearance. Thus, the Court showed the distinction between the two proceedings, that of objecting to the jurisdiction in the lower Court and that of taking an appeal to the Supreme Court, and showed the different rules applying to the different proceedings, establishing conclusively that the prosecution of an appeal was a voluntary action constituting an appearance.

The appeal was voluntary. There was no process compelling appearance. There is no substantial difference between the instant case and the other cases decided by the Supreme Court of Florida.

Had no appeal been taken, the question could

very well have been raised in this suit in the District Court. But having appealed, *voluntarily,* in the State Court, respondent waived its objection to the jurisdiction over its person under the undoubted Florida rule.

The reason and justice of the rule is this: it prevents a defendant from doing what respondent has attempted to do in this case, that is, secure, if possible, the benefit of a binding adjudication in its favor *through the exercise of the court's jurisdiction;* and at the same time to deprive its adversary of any possibility of success by reserving an objection that the Court had no jurisdiction to render any judgment against it.

> West Ind. Co. vs. Rupp, 235 U. S. 261, 59 L. ed. 220; 225.

These reasons underlying the Florida rule apply regardless of the nature of the decree appealed from, and the Court of Appeals erred in failing to apply it to the proceedings under consideration.

In the case of the Chicago Life Insurance Co. vs. Cherry, 244, U. S. 25-30, 61 L. ed. 966 (decided May 7th, 1917) at page 969, in its opinion the court says:

> "But when the power of the court in all other respects is established, what acts of the defendant shall be deemed a submission to its power is a matter upon which states may differ. If a statute should provide that filing a plea in abatement, or taking the question to a higher

court, should have that effect, it could not be said to deny due process of law. The defendant would be free to rely upon his defense by letting judgment go by default. York v. Texas 137 U. S. 15, 34 L. Ed. 604, 11 Sup. Ct. Rep. 9, Western Life Indemnity Co. v. Rupp, 235 U. S. 261, 272, 273, 59 L. Ed. 220, 224, 225, 35 Sup. Ct. Rep. 37. If, without a statute, a court should decide as we have supposed the statute to enact, it would infringe no rights under the Constitution of the United States. That a party that has taken the question of jurisdiction to a higher court is bound by its decision was held in Forsyth v. Hammond, 166 U. S. 506, 517, 41 L. Ed. 1095, 1099, 17 Sup. Ct. Rep. 665. It can be no otherwise when a court so decides as to proceedings in another state. It may be mistaken upon what to it is matter of fact, the law of the other state. But a mere mistake of that kind is not a denial of due process of law. Pennsylvania F. Ins. v. Gold Issue Min. & Mill Co. 243 U. S. 93, 96, ante, 610, 37 Sup. Ct. Rep. 344. Whenever a wrong judgment is entered against a defendant, his property is taken when it should not have been; but whatever the ground may be, if the mistake is not so gross as to be impossible in a rational administration of justice, it is no more than the imperfection of man, not a denial of constitutional rights. The decision of the Illinois courts, right or wrong, was not such a denial. If the Tennessee judgment had been declared void in Illinois, this court might have been called upon to decide whether it had been given due faith and credit. National Exch. Bank v. Wiley, 195 U. S. 257, 49 L. Ed. 184, 25 Sup. Ct. Rep. 70."

In the case of Forsyth vs. Hammond, 166 U. S., 506-520, 41 L. Ed. 1095-1100, we quote: Headnote No. 5:

> "5. One who has voluntarily sought the judgment of the supreme court of a state to declare that a decree of a lower court was not only erroneous but void, although not a voluntary litigant in the trial court, is bound by the judgment of the supreme court as res judicata, and cannot attack it collaterally in a circuit court of the United States."

In said case at page 1100, in its opinion the Court says:

> "The construction by the courts of a state of its Constitution and statutes is, as a general rule, binding on the Federal Courts. We may think that the supreme court of a state has misconstrued its Constitution or its statutes, but we are not at liberty to therefore set aside its judgments. That court is the final arbiter as to such questions."

C — THE PROCEEDINGS IN THE STATE COURT WERE PROCEEDINGS IN REM, TO THE VALIDITY OF WHICH PERSONAL SERVICE WAS UNNECESSARY.

In the foregoing pages of this brief we have shown that under the established rule in Florida, the respondent by appealing in the proceedings in the State Court, submitted itself to the jurisdiction of the Court and in effect entered a general appearance. Therefore the respondent was properly before the State Court for the entry of even personal decrees against it.

Even aside from this consideration however, the decrees in the State Court are binding and valid, because they are decrees *in rem*, entered in proceedings *in rem*, and to the validity of which personal service of process, or jurisdiction over the person is unnecessary. All that is essential is that there be a thing, a *res*, property of the defendant, within the Court's jurisdiction.

Here again the Court of Appeals decided contrary to the Supreme Court of the State of Florida. The former held that the proceedings in the State Court were not proceedings *in rem*, because there was no *res* in the control of the State Court, (Transcript, p. 76). The Florida Supreme Court held that the proceedings were *in rem*, the bill not praying for a personal decree against the non-residents, but confining its prayer to an adjudication of the funds sought to be impounded, (Transcript, p. 53).

The Circuit Court of Appeals, we contend, is in error in considering the proceedings as actions *in personam*. The decrees in the State Court merely determined the rights of the parties to the *res* in the jurisdiction of the Court. This *res* was the *indebtedness*, or the supposed indebtedness of petitioner, on the certificates of deposit. These certificates represented a fund in the hands of the petitioner, The Bank of Jasper, a resident corporation.

The Court of Appeals considered the fund as a part of a *general* deposit, and that there was therefore no specific fund over which the Court could exercise control. An examination of the certificates of deposit (Transcript, pp. 5 and 6) reveals that they did represent a special fund, or deposit, because they "were not subject to check" and because they were not payable except "on the return of this certificate properly endorsed." The fact that the certificates were in the State of Georgia is immaterial. They were merely evidence of the deposits, which were in the Jasper Bank. These deposits consisted of the proceeds of promissory notes given by the complainants in the suits in the State Court to petitioner.

But even granting for the sake of argument, that there were no specific funds that could be identified, the *res* still existed. It was the *indebtedness* of the Bank of Jasper, created by the certificate of deposit, and the only purpose of the suits and the only effect of the decrees, was to adjudicate the rights of the parties to that indebtedness.

The Circuit Court of Appeals proceeded upon the theory that there can be no action *in rem* unless there be a *res* in the form of a *tangible* thing. But a *res* may as well be intangible as tangible. It is well settled that a *debt* is a *res* and that its situs is the home of the debtor, where it may be administered through actions *in rem*. It is only the recognition of this principle that garnishment proceedings can be justified. The debtor, The Bank of Jasper, being in the jurisdiction of the State Court, the debt, the *res*, was also in the Court's jurisdiction.

In Bristol vs. Brent, 30 Utah 108, 21 Ann. Cases 1125, it is said:

> "A proceeding by which jurisdiction is sought by attaching property, whether tangible or intangible such as a debt, is essentially a proceeding *in rem:* that is, a proceeding against a *rem* which is brought into the custody of the law and hence within the jurisdiction of the Court."

The foregoing citation is presented to show a debt is considered as a *res*, sufficient to support a proceeding *in rem*.

The same principal is illustrated by the following quotation from 12 R. C. L. 777:

> "When the jurisdiction of the court is based on the attachment of property, such as a debt, and not on the residence of the parties proceeded against the action is essentially a proceeding *in rem*. For example, an action in one state by a resident thereof against a resident of another state to recover an indebtedness, in which garnishment proceedings are instituted

> against a foreign corporation doing business in both states, the principal debtor being served by publication, is an action *in rem*, the *res* being the indebtedness due from the corporation to the defendant."

And in 5 R. C. L. at page 930, it is said:

> "The general rule of law is well settled, that for the purpose of founding administration, all simple contract debts are assets at the domicil of the debtor. *And the locality of such a debt for this purpose is not affected by a bill of exchange or promissory note having been given for it, because the bill or note does not alter the nature of the debt, but is merely evidence of it, and likewise it is held in the case of a note that the property has its situs in the place in which the maker resides and not where the note is held.*" (Italics ours).

The above language is taken almost verbatim from the opinion of this court in Wyman vs. U. S. 109, 654, 27 L. Ed. 1068.

That a debt is a *res* is further evidenced by the following language used by the court in the case of Swedish American Bank. vs. Bleeker, 72 Minn., 383, 75 N. W., 740, 42 L. R. A. 283:

> "This is a proceeding *in rem*. Aultman v. Markley, 61 Minn. 404. The *res* is the indebtedness due from the garnishee to the defendant."

The Supreme Court of the United States has passed on the questions as here involved in the case of Goodman vs. Niblack, 102 U. S. 556, 26 L. Ed. 229, decided subsequent to Pennoyer vs. Neff, 95

U. S. 714, 24 L. Ed. 572. In the Goodman case the defendant, Niblack, as administrator of an estate, had in his hands One Hundred and Fifty Thousand Dollars, ($150,000.00). The plaintiff had a judgment against the decedent for Thirty-one Thousand Three Hundred and Forty-four Dollars and forty-four cents ($31,344.44). A bill in chancery was brought to subject the funds in the hands of the administrator to the payment of the judgment, it being claimed that the money was a trust fund, devoted by the decedent to the payment of the judgment. The Court, in referring to the possible inability to obtain service on the trustees of the money, held that service by publication would bind them in so far as the decree entered affected the funds in the hands of the administrator, Niblack. It was said:

> "This is a proceeding in equity to force a lien on the fund which is within reach of the court, and as the trustees and complainant have the requisite citizenship, section 738 of the Revised Statutes provides a remedy for inability to serve process by an order of publication. If they appear, the suit will proceed as usual. If they do not appear, the decree, so far as it affects the fund in the hands of Niblack, will bind them; and that is all that is necessary to give the court jurisdiction to grant the relief prayed by defendant."

The situation here is very similar. Instead of an administrator having custody of the funds in question, we have a Bank in possession of the money. In each case, a trust is sought to be impressed on

the funds for the benefit of the complainant. In each case the money is in the jurisdiction of the court, and the custodian of the money is before the court, personally served. No fundamental distinction can be observed, and the decision in the Goodman case, holding that the decree, insofar as it affected the funds, would be binding as to interested parties served by publication only, must be adhered to as controlling.

In Gamble vs. Dawson, 67 Washington, 72; 120 Pac. 1060; Ann. Cases 1913 D-501, an action in equity was brought against a resident corporation to have five thousand (5,000) of its shares of stock held by a non-resident defendant decreed to be the property of the complainants; to have such shares cancelled, and new ones issued to complainants; and to restrain the defendant corporation from transferring such shares of stock to any one but the complainants. It was held that the certificates of stock were mere *evidences* of property; that the property represented by such shares of stock was in the corporation which was in the jurisdiction of the court; that the court had jurisdiction, accordingly, over such property and its decree adjudicating the title thereto was valid.

To the same effect is Jellenik vs. Huron Copper Mining Company, 177 U. S. 1, 44 L. Ed. 647, which, as the court said in its opinion, was for the purpose of removing an incumbrance, or cloud on the title to certain shares of stock of a resident corporation. The shares were owned by non-resident defendants who were served by publication only. The opinion

is devoted mainly to the consideration of the question of whether the situs of the shares of stock was the residence of the corporation or the residence of the owner of the shares. It was held that the situs was the residence of the corporation, the corporation property being the property represented by the shares and certificates. Arriving at this conclusion, the court, without further discussion held that the court having jurisdiction over the property of the corporation could adjudicate the title to the shares of stock of the corporation.

That case is closely analogous to the instant case. In the suit referred to in defendant's (petitioner here) plea, (Transcript, p. 7) the property in question was in the jurisdiction of the court, although the certificate of deposit, or promise to pay over that property, which certificate of deposit was at most mere *evidence* of the money itself, was in another State. Under the holding in the Jellenik case, it was proper for the court to adjudicate and determine the title to the deposit, although the holder of the certificate was a non-resident and served by publication only.

In the case of Quarl vs. Abbett, 102 Ind. 233, 52 Am. Rep. 662, the essential facts were similar to those here involved. That was a suit against two non-resident defendants to declare void as fraudulent a transfer between them of certain shares of stock in a resident corporation. The property concerned, that of the corporation, was in the court's jurisdiction. Service on the non-residents was had by publication. It was held that the judgment set-

ting aside the transfer as fraudulent and subjecting it to the payment of complainant's demand, was valid, though based on constructive service of process on the non-resident claimants to the stock. We quote from the opinion:

> "It is a general principle that the process of the courts may reach and seize property within their jurisdiction. A man who brings property within the territorial jurisdiction of a State subjects it to the laws of that State. 'If a foreigner or citizen of another State,' says an able court, 'send his property within a jurisdiction different from where he resides he impliedly submits it to the rules and regulations in force in the country where he places it. What the law protects, it has the right to regulate.' Clark v. Tarbell, 58 N. H. 88. This general doctrine has been declared by other courts, among them our own. Ames Iron Works v. Warren, 76 Ind. 512; Green v. Can. Buskirt, 7 Wall. 139; Rice v. Curtis, 32 Vt. 460. It is upon this general principle that our statutory provisions relative to notice by publication are founded. If property of a non-resident cannot be reached by legal process upon constructive notice, then our statutes were passed in vain, and are mere empty legislative declaration, without either force or meaning; for if the person is not within the jurisdiction of the court, no personal judgment can be rendered, and if the judgment cannot operate upon the property, then no effective judgment at all can be rendered, so that the result would be that the court would be powerless to assist a citizen against a non-resident. Such a result would be a deplorable one. If the rule were that which

appellant's argument asserts, a citizen with a chattel mortgage could not enforce it on property within our borders against a non-resident, nor could a creditor enforce a lien against a man who had fled to Canada and made it his residence, although he had abundance of property within the State. Nor if the rule were as asserted, could property of a non-resident corporation within our limits be reached. But the rule is not as contended for; property within our jurisdiction may be seized upon process issued upon constructive notice. This has been often decided with respect to attachment proceedings. Judge Story says: 'Sometimes seizure or attachment is purely nominal, as for example of a chip, or a cane, or a hat. In other cases the seizure or attachment is bona fide of real property or personal property within the territory or of debts due to the non-resident persons in the hands of their debtors who live within the country. In such cases, for all purposes of the suit, the existence of the property so seized or attached within the territory constitutes a just ground of proceeding to enforce the rights of the plaintiff to the extent of subjecting such property to execution upon the decree or judgment.' Story Conf. Laws, para. 549. Wharton says: 'But when the thing is situate within the jurisdiction of the court, then proceedings in rem give a title to it against all the world.' Wharton Conf. Laws, para. 829. He applies this doctrine to the seizure of goods under a writ of attachment, and cites Ewer v. Coffin, 1 Cush. 23; Phelps v. Holker, 1 Dall. 261; Pawling v. Bird, 13 Johns 192; Arndt v. Arndt, 15 Ohio 33;

McVicker v. Beedy, 31 Maine 314; Bissell v. Briggs, 9 Mass. 462.

"It is said by appellant's counsel that fraud is a question of fact, and therefore that such a question cannot be tried upon constructive notice. This position is not tenable. Any question affecting the status of the specific property within the jurisdiction of the court and the rights of the parties in the property may be tried. The purpose of notice by publication is to give the best notice practicable to non-resident defendants, and thus enable the court to fully decide the controversy respecting property within its jurisdiction, no matter what form the question may assume. If this be not true, then in attachment proceedings fraud could never be shown where non-residents were parties, and that this cannot be true is too clear to admit of debate.

"The authority to hear and determine a cause is jurisdiction to try and decide all of the questions involved in the controversy. The principle is an ancient one, and even in the time when the contest between the chancery courts and the common law courts was hot and angry, it was recognized and enforced. Where the jurisdiction of the court once attaches it extends over the whole case, and the court will determine all questions necessary to a full adjudication of the controversy. Field v. Holzman, 93 Ind. 205; Carmichael v. Adams, 91 Ind. 526; 1 Pom. Eq. Jur. para. 231. The authority to determine whether property is subject to a lien, or liable to be seized under a writ of attachment, or liable to be applied to the payment of the claims of creditors, necessarily confers jurisdiction to determine the amount of indebted-

ness, for in almost every case the court must ascertain the indebtedness. Thus in an action to foreclose a mortgage, the court must ascertain the amount of the indebtedness, so in an action to enforce a claim against property fraudulently conveyed the amount of the debt must be ascertained, and so in attachment proceedings, the amount of the indebtedness must be ascertained in order to make the proper order for the sale of the attached property. In such cases the court in ascertaining the amount due does not proceed against the person but simply ascertains the amount that shall be adjudged a lien on the property, or that shall measure the extent of the creditor's claim against it. The statement of the amount in the finding and the decree of the court in such cases is not a personal judgment, but is a mere statement of a finding upon one of the questions in the case."

A case which cannot be distinguished from the one before this Honorable Court, is Loaiza vs. Superior Court for San Francisco, 85 Cal. 11, 9 L. R. A. 376. There, some real property situated in Mexico had been sold to the complainants, through false and fraudulent representations of the vendors who lived in Mexico. When the property was purchased, the complainants delivered certain moneys and securities to a stakeholder in California. The property sold was in Mexico, and the defendant vendors were in Mexico. Suit was brought in California, the residence of the stakeholder, and where were located the funds sought to be impressed with trust in favor of the complainant. Service on the

non-resident defendants, for whose benefit the stakeholder was holding the funds, was had by publication. It was held that as the property, title to which was to be adjudicated, was within the court's jurisdiction, judgment could be validly entered disposing of the property upon service by process by publication only on the non-resident claimants. In both that case and the instant case, personal property was involved. In both cases the property and the stakeholder were in the territorial jurisdiction of the court. In both cases the property concerned consisted of the purchase price for property sold through fraud. In both cases the defendants to whom the funds in question were payable, were non-residents, served by publication only. In both cases the relief sought was the same.

It was contended, in the Loaiza case, that because the defendants were non-residents, and not personally served, the court had no jurisdiction. In the course of the opinion, the California Court points out the error into which counsel for the non-resident defendants had fallen in the application of the case of Hart vs. Sansom, 110 U. S. 115; Pennoyer vs. Neff, 95 U. S. 714, 24 L. ed. 572, and other cases relied on, and says: "But all this argument is based upon a misapprehension of the character and object of the action here under discussion and of the relation of the parties to each other at the commencement of the action." After reviewing a number of decisions of the United States Supreme Court, the opinion concludes:

"Even in the case of Arndt v. Griggs, 134

U. S. 316 (33 L. ed. 918), cited by petitioner, the court says: 'It (the state court) cannot bring the person of a non-resident within its limits,— its process goes not out beyond its borders * but it may determine the extent of his title to real estate within its limits and for the purpose of such determination may provide any reasonable method of imparting notice.'

"If the State Court had such power with reference to title to real estate held by a non-resident, how much the more will it have the same with reference to personal property situate within its jurisdiction. And the real and primary purposes of the action here under review is to determine the title and right to possession of the moneys and securities now within the jurisdiction of the court, secured from the plaintiffs in the action by fraud, under a contract which they were by law authorized to rescind, and did rescind, upon discovery of the fraud. Our Statute says that in such a case the person who gains a thing by fraud is an involuntary trustee of the thing gained, for the benefit of the person who would otherwise have had it. Civil Code, para. 2224. This being so, it cannot be that the arm of equity is so short, or so weak, that the fraudulent trustee,— he who has become trustee by fraud,— by remaining beyond the jurisdiction of the court, can prevent the court from seizing upon the subject of the trust within its jurisdiction, and restoring it to the defrauded cestui que trust. That the court has such jurisdiction as is here claimed for it is fully sustained in Felch v. Hooper, 119 Mass. 52, where the case is clearly distinguished from that of Spurr v. Scoville, 57 Mass. 579, cited by petitioner; in National Exch. Bank v. Sterling,

> 31 S. C. 360; Quarl v. Abbott, 102 Ind. 233; in King v. Vance, 46 Ind. 251, where the court says: 'The defendant may be brought in by publication, and when thus notified a defendant is before the court for all purposes except the rendition of a personal judgment;' and in Martin v. Pond, 30 Fed. Rep. 15, where Mr. Justice Brewer says: 'It may be conceded that notice to the defendant is necessary to divest him of his rights and interest. But the publication is notice — it is equivalent to the personal service of summons.' "

Now in the proceedings relied on in defendant's additional pleas, (petitioner here), (Transcript, p. 7), the primary object of the suit was to determine the right of such non-resident defendants to a fund or deposit within the jurisdiction of the State Court, which fund or deposit, was created by such defendants by fraud, as the court held. Can it be declared to be the law that a person can come into the State of Florida, obtain money, or other personal property through fraud, leave the property within the State and within the jurisdiction of the State courts, go to a distant State, and be immune against any action in a court of equity to have his pretended ownership of the property adjudicated by the forum in which the property is situate and in which the fraud was perpetrated? Are State courts to be held powerless to protect their citizens in such circumstances? Is it to be said that citizens can be defrauded of their property, and that the courts must sit idly by, with that property in plain view, and within their reach, impotent to make restitution, because those who com-

mitted the fraud have stepped over the border line of the State? Such is not, never has and never could be, the law. With the property in its jurisdiction, the court by giving statutory notice, as was done here, can adjudicate title to the property and restore it to the proper owner, although of course its decrees can have no personal effect on the absent parties not personally served. Such is the law as stated in the cases heretofore cited in this brief, and such is the law if reasoned out on the basis of justice, practicability and common sense.

The principle that a court may adjudicate the title to personal property within its jurisdiction, although the owners or claimants of such property are non-residents and not personally served, has time and again been recognized and applied by the Supreme Court of the United States.

Chicago etc. R. R. v. Sturm, 174 U. S. 710, 43 L. ed. 1144.

Harris v. Balk, 198 U. S. 215, 49 L. ed. 1023.

N. Y. L. Ins. Co. v. Dunlevy, 241 U. S. 518, 60 L. ed. 1140.

L. & N. R. R. v. Deer, 200 U. S. 176, 50 L. ed. 426.

B. & O. R. R. v. Hostetter, 240 U. S. 620, 60 L. ed. 829.

Amparo Mining Company vs. Fidelity Trust Company (N. J.) 71 At. 605, was an action in equity, brought in New Jersey by a New Jersey corporation, against a Pennsylvania corporation which was served

by publication only. The object of the bill was to establish title to 549,504 shares of stock belonging to the complainant, which the defendant claimed to own. The bill alleged that the defendant acquired the stock under such circumstances that it must be deemed to hold them in trust for the complainant. It was held that as the *res*, the stock, was in the court's jurisdiction, it could proceed to establish title thereto, notwithstanding the fact that the defendant owner thereof was a non-resident and not personally served. The opinion is exhaustive and instructive, reviewing thoroughly the authorities in point, and answering in detail all the possible objections that might be raised against the holding. The court stated that:

> "The authorities which control this court, indicate, I think, the following as the essential elements of an action quasi in rem: (1) A res located within the territorial limits of the state in such a way that the state can, if it see fit to do so, exercise absolute power to control and dispose of it; (2) a course of judicial procedure, the object and result of which are to subject the res to the power of the state directly by the judgment or decree which is entered, as distinguished from a course of procedure which only affects or disposes of the res by compelling a party to the action to control or dispose of the res, in accordance with the mandate of the judgment or decree; (3) a course of judicial procedure on its face directed specifically toward the res so as to disclose this res to the defendant when reasonably notified of the action."

Then, after an interesting discussion too lengthy to be reproduced in this brief, the court continues:

> "In supporting the proposition that the present suit is strictly a suit in personam the brief for the defendant alleges 'that the object of the suit is to obtain relief which could only be decreed in personam' and points out that 'the prayer is specifically limited to a decree directing the defendant to transfer the shares of stock in question' and that 'the operation of the decree would be purely against the person of the defendant.' In support of these views it is alleged that 'the case differs from those in which decrees are sought to compel the conveyance of lands' in which cases by statute the 'decree if not complied with by the defendant can operate itself as a conveyance' and it is insisted that 'no similar provision is made for the transfer of property purely personal' such as the shares of stock in question. This argument seems to rest upon a mistaken view of the nature of the case set forth in the complainant's bill and of the relief therein prayed for, as well as an inadequate view of the power of the Court of Chancery to enforce its decrees affecting personal property which it can sieze and control. The allegations of the bill show that the stock in litigation is charged with a trust for the complainant's benefit, and that the complainant is the equitable owner of this stock, and that the defendant, as executor, etc., has no estate or interest therein, excepting so far as the same stands as security for the sum of $40,000. The prayer of the bill is that the rights under the trust above mentioned may be established by the decree of the court, as

well as that the defendant may be decreed to assign and transfer the said shares of stock to the complainant upon payment of the said sum of $40,000 with the interest thereon. Of course, it must be conceded that in any action to recover stock, if the relief prayed for includes the surrender of a certificate, or the execution of an assignment or power of attorney, such relief can only be obtained by compelling the defendant to act, and if such relief is the whole relief prayed for, the action, as we have seen, may be strictly in personam. In the present case, while the bill prays that the defendant may be decreed to assign and transfer the shares of stock in dispute, the main relief prayed for is the establishment of the complainant's equitable title. The jurisdiction of the court is sustained by the existence of a trust, a trust in respect to a res, situate within the jurisdiction of the court and in the custody of a party to the suit. If the complainant shall obtain a decree in this case establishing its rights in respect of the res, and then shall desire to secure the surrender of the outstanding certificates representing the res, it may be obliged to bring a suit in the State of Pennsylvania in order to secure such a surrender. A similar situation would exist if the defendant were a natural person resident in New Jersey who had been duly served with process in New Jersey, but who had gone out of the State, carrying with him the certificates representing the stock which was the subject-matter of the litigation. In such a case, however, the decree would be enforceable in personam, whenever the defendant could be seized within the state of New Jersey."

The opinion concludes in the following language:

> "My conclusion is, that the present action has all the essential characteristics of an action *quasi in rem*, and that the defendant, having been duly notified of the suit so as to give it ample opportunity to appear and make defense therein, will, if it refrains from appearing, be bound by the decree so far as the same relates to the status of the res, and that in such case the defendant cannot maintain that it is deprived of property without due process of law."

The foregoing decision was affirmed by the New Jersey Court of Errors and Appeals, 73 Atl. 249.

In Gassert vs. Strong (Mont.) 98 Pac. 497, the question raised by this writ of error was squarely before the court. It was there expressly stated that an action to establish and enforce a trust in personal property fraudulently obtained is an action *in rem*, and even though the defendants holding the legal title are non-residents and served by publication only, yet the court has jurisdiction to declare and enforce a trust against them because the subject matter of the trust is within the territorial jurisdiction of the court. The opinion, after pointing out that the fact that the action was in form against the non-resident defendants personally was immaterial, and after reviewing the decisions of the United States Supreme Court already presented in this brief, said:

> "It has been quite generally held that an action to establish and enforce a trust in real estate is a proceeding quasi in rem (Porter Land & Water Co. v. Baskin (C.C.), 43 Fed. 323; Reeves, v. Pierce, 64 Kan. 502, 67 Pac.

1108), and that 'the courts of the state where the trust property is situate have jurisdiction over the enforcement and administration of the trust so far as the property within their jurisdiction is concerned.' 22 Ency. Pl. & Pr. 21. And, again, it is said that a court having jurisdiction of a trust estate does not lose it by reason of the trustee's absence from the state. Pennington v. Smith (C. C.) 69 Fed. 188."

Then after quoting from Loaiza vs. Superior Court (Cal.) 9 L. R. A. 376, quoted supra, the Court continued:

"From the facts stated in the complaint in this action, it appears that these 5,000 shares of stock are charged with a trust, and it cannot be urged that our courts are powerless to enforce such trust, merely because one of the parties holding the legal title thereto is beyond the reach of the process of such courts. We think it sufficient to give the court jurisdiction that either the party or the subject-matter of the trust is within the reach of the court. And this appears to be the holding of the courts, Felch v. Hooper, 119 Mass. 52.

"To what class of actions, then did section 610 above, before the amendment of 1907 apply? In the language of the Supreme Court, in Roller v. Holly, 176 U. S. 398, 20 Sup. Ct. 410, 44 L. Ed. 520, we think 'it applies to all cases where under recognized principles of law suits may be instituted against non-resident defendants.' That it was so intended we think is obvious from the general terms in which the section is couched; and, so far as we know the only exception which can be made from the operation of its provisions is in actions in

personam, strictly speaking. We are of the opinion that the present action is not such a one, but that it falls within the definition of a proceeding quasi in rem, and that substituted services upon L. M. Strong was sufficient to enable the district court to determine the relative rights of the parties to the stock in question, even though it would not be sufficient to warrant a personal judgment against L. M. Strong himself."

Cases to the same effect might be cited ad infinitum but we have already presented sufficient to reveal the unanimity of judicial opinion on the points in question. It cannot possibly, in view of the many cases cited supra, be contended that the proceedings in the State court were not proceedings *in rem*. The fact that the certificates of deposit were in Georgia is immaterial. They were mere evidences of the deposits, which were in the Jasper Bank. These deposits consisted, it appears from the copies of the bills of complaint attached to the replications (Transcript, pp. 35 to 41), of the proceeds of promissory notes given by the complainants in those suits to the respondent here, and by it delivered to the Jasper Bank, this petitioner. The notes were at all times outstanding and constituted the *res* which was the subject matter of the suits in the State court. And even if we disregard the presence of the notes, and consider the case as merely one of a general deposit, evidenced by certificates of deposit, the *res* would still be in Florida, at the Jasper Bank, being the indebtedness of it to the respondent here. A debt has

often been held to be a *res*, such as will support an action *in rem* against it, and its situs for the purpose of administration, is considered to be at the home of the debtor. In the present case, the debtor, Jasper Bank, being within the jurisdiction of the State Court, the debt, the *res*, was also in the jurisdiction.

The Supreme Court of the United States has also held that a debt is a *res*, the situs of which is the domicil of the debtor. See C. R. I & P. R. Co. vs. Sturm, 174 U. S. 710; 43 L. ed. 1144, where it was said:

> "The idea of locality of things which may be said to be intangible is somewhat confusing, but if it be kept up the right of the creditor and the obligation of the debtor cannot have the same, unless debtor and creditor live in the same place. But we do not think it is necessary to resort to the idea at all or give it important distinction. The essential service of foreign attachment laws is to reach and arrest the payment of what is due and might be paid to a nonresident to the defeat of his creditor. To do it you must go to the domicil of his debtor and can only do it under the laws and procedure in force there. This is a legal necessity, and considerations of situs are somewhat artificial. If not artificial, whatever of substance there is must be with the debtor. He and he only has something in his hands. That something is the *res*, and gives character to the action as one in the nature of a proceeding *in rem*. Mooney v. Buford & George Mfg. Co. (34 U. S. App. 581), 72 Fed. Rep. 32; Conflict of Laws, sec. 549, and notes.

> "To ignore this is to give immunity to debts owed to non-resident creditors from attachment by their creditors, and to deny necessary remedies. A debt may be as valuable as tangible things. It is not capable of manual seizure, as they are, but no more than they can it be appropriated by attachment without process, and the power to execute the process. A notice to the debtor must be given, and can only be given and enforced where he is. This, as we have already said, is a necessity, and it cannot be evaded by insistence upon fictions or refinements about situs or the rights of the creditor. Of course, the debt is the property of the creditor, and because it is, the law seeks to subject it, as it does other property, to the payment of his creditors. If it can be done in any other way than by process against and jurisdiction of his debtor, that way does not occur to us."

Since, therefore, the law is settled that a debt is a *res*, the situs of which is the domicil of the debtor, it cannot be contended that in the suits in the State Courts, there was no *res* on which to operate. The debt was the *res*, the debt owing to the plaintiff here by this defendant, Jasper Bank, and the situs of the debt was Hamilton County, Florida, the domicil of the debtor. However, as we have seen, the notes, the specific securities and assets represented by the certificates of deposit were also in the custody of the Jasper Bank and within the State court's undoubted jurisdiction.

This indebtedness the Court adjudicated and enjoined your petitioner from paying it to the respondent, or anyone for it.

The holding in C. R. I. & P. R. Co. vs. Sturm, 174 U. S. 710, 43 L. Ed. 1144, was followed in New York Life Ins. Co. v. Dunlevy, 241 U. S. 521, 60 L. Ed. 1142 where it was held that a State Court could, on garnishment by an execution creditor, require the amount due a non-resident to be determined, and appropriate it to the payment of the judgment, although the non-resident creditor was not in Court.

A very similar case to the case at bar is that of Pennington v. Fourth National Bank, 243 U. S. 269-273; 61 L. Ed. 713, (decided March 6, 1917). In said case Mrs. Pennington brought a suit for divorce, in a State court of Ohio, against her husband, who was a non-resident of Ohio, who was served with process by publication only, and had not voluntarily appeared in the suit. She obtained a valid decree of divorce. In the same proceeding she sought alimony; and in order to insure its payment joined as a defendant the Fourth National Bank of Cincinnati, in which her husband had a deposit account. When the suit was filed the court entered a preliminary order enjoining the Bank from paying out any part of the deposit. Under later orders of the Court, the Bank made payment from it to the wife. Finally it was perpetually enjoined from making any payments to the husband and ordered to pay the balance to the wife, which it did. The husband then presented to the bank a check for the full amount of the deposit, asserting that the court's orders deprived him of his property without due process of law, in violation of the 14th Amendment. Payment of the check was refused. Thereupon, Pennington

brought in another State court of Ohio, an independent action against the bank for the amount. Judgment being rendered for the bank, he took the case by writ of error to the Court of Appeals for Hamilton County, and from there to the Supreme Court of Ohio. Both these courts affirmed the judgment below. Then the case was taken to the Supreme Court of the United States for review, Pennington still claiming that his constitutional rights had been violated.

In the above case and the case at bar service by publication was had on the non-resident defendants. In both cases a resident bank, holding the funds of a non-resident defendant, was made a defendant and personally served with process. In both cases the defendant bank was enjoined from paying the money to the defendant in whose name the funds were deposited, and was ordered to pay said deposit to the plaintiff. In both cases the deposit in the resident bank, defendant, the debt due the non-resident defendant, was the res adjudicated by the State court. Said deposit was property within the State and in the jurisdiction of the State Court. In both cases the situs of the debt or res is the residence of the defendant, the resident bank. In both cases personal property was involved. In both cases the original suit was by bill in chancery in which the State court entered final decree, in which the resident bank defendant was enjoined from paying the money to the non-resident defendant in whose name the funds were deposited, and was ordered to pay said deposit to plaintiff. Thereafter in both cases,

the original non-resident defendant, brought an independent action in another court against the original resident bank, defendant, for the amount of the deposit. Finally, in both cases the entire matter was taken to the Supreme Court of the United States for review.

In the above case, Pennington vs. Fourth Nat. Bank, 243 U. S. 269-273, 61 L. Ed. 713, at page 714, in its opinion the court says:

> "The 14th Amendment did not, in guaranteying due process of law, abridge the jurisdiction which a state possessed over property within its borders, regardless of the residence or presence of the owner. That jurisdiction extends alike to tangible and to intangible property. Indebtedness due from a resident to a non-resident—of which bank deposits are an example is property within the state. Chicago R. I. & P. R. Co. v. Sturm, 174 U. S. 710, 43 L. Ed. 1144, 19 Sup. Ct. Rep. 797. It is, indeed, the species of property which courts of the several states have most frequently applied in satisfaction of the obligations of absent debtors. Harris v. Balk, 198 U. S. 215, 49 L. ed. 1023, 25 Sup. Ct. Rep. 625, 3 Ann. cases 1084. Substituted service on a non-resident by publication furnishes no legal basis for a judgment in personam. Pennoyer v. Neff, 95 U. S. 714, 24 L. ed. 565. But garnishment or foreign attachment is a proceeding quasi in rem. Freeman v. Alderson, 119 U. S. 185, 187, 30 L. ed. 372, 373, 7 Sup. Ct. Rep. 165. The thing belonging to the absent defendant is seized and applied to the satisfaction of his obligation. The Federal Constitution presents no obstacle to the full exercise of this power.

"It is asserted that these settled principles of law cannot be applied to enforce the obligation of an absent husband to pay alimony, without violating the constitutional guaranty of due process of law. The main ground for the contention is this: In ordinary garnishment proceedings the obligation enforced is a debt existing at the commencement of the action, whereas the obligation to pay alimony arises only as a result of the suit. The distinction is, in this connection without legal significance. The power of the state to proceed against the property of an absent defendant is the same whether the obligation sought to be enforced is an admitted indebtedness or a contested claim. It is the same whether the claim is liquidated or is unliquidated, like a claim for damages in contract or in tort. It is likewise immaterial that the claim is, at the commencement of the suit, in choate, to be perfected only by time or the action of the court. The only essentials to the exercise of the state's power are presence of the res within its borders, its seizure at the commencement of proceedings, and the opportunity of the owner to be heard. Where these essentials exist, a decree for alimony against an absent defendant will be valid under the same circumstances and to the same extent as if the judgment were on a debt, that is, it will be valid not in personam, but as a charge to be satisfied out of any property seized. Cases are cited in the margin.

"The objection that this proceeding was void, because there was no seizure of the res at the commencement of the suit, is also unfounded. The injunction which issued against the bank was as effective a seizure as the cus-

tomary garnishment or taking on trustee process. Such equitable process is frequently resorted to in order to reach and apply property which can not be attached at law. Cases are cited in the margin.

"Affirmed."

In accordance with the above opinion we maintain that defendant's (petitioner here) two additional pleas, with exhibits attached (Transcript, pp. 7 to 11 and pp. 11 to 17) to first two counts of plaintiff's (respondent here) declaration (Transcript, pp. 3 to 6) are a complete defense to respondent's cause of action.

We wish to call the attention of this Court to the decision of the Florida Supreme Court in the case of Rome Ins. Co. vs. Corbett, 63 So. 833 (Transcript, pp. 53 and 54). In that case the same points are involved as are presented by the writ of error to the United States Circuit Court of Appeals. In fact said writ of error amounts in effect to an appeal from the Supreme Court of Florida to said Circuit Court of Appeals, for it is the decision in Rome Ins. Co. vs. Corbett, of which the respondent here really complains. The Court there said:

"A bill was filed in the Circuit Court for Hamilton County against local defendants and also certain non-resident corporations, seeking to impound a fund in that county arising out of an alleged fraudulent transaction consummated in that county. Constructive service, in perfect accordance with the statute, was had by publication, and the non-resident corporation ap-

peared specially to quash the service upon the theory that the sole relief prayed was in personam, and that therefore the statute authorizing constructive service by publication does not apply. This motion having been denied these non-residents have sued out what they term a special appeal.

and,

"The bill *confines its prayer to an adjudication of the fund sought to be impounded*, and does not pray for a general personal decree against these non-residents, and we are not to assume upon the face of the bill that the Circuit Court will enter an unauthorized decree; and we have not before us any such question of jurisdiction as was involved in the case of Pennoyer vs. Neff, 95 U. S. 714.

"The purpose of the statute authorizing constructive service by publication is to notify non-residents of the pending suit so that they may if they care to do so, come into the case, and if the statute be followed, there is no right in the non-resident to quash this notice; he has his right if not waived, to object should the Court thereafter commit an error against him.

"Our constructive service statute is broad enough to apply to any suit in equity pending in our Circuit Courts, and as has been said in Kilpatrick v. Post, 53 N. J. Eq. 591, 32 Atl. Rep. 267, cannot be confined in its operation to the cases where the Court might make final decree or judgment. Further that Court says, 'It was not intended that the question of the power to enter the ultimate decree or judgment should enter into the question of the right to give notice of the suit to a non-resident, or that this

question of jurisdiction should be settled on a motion to discharge the order of publication. The complainant is entitled to have the question of jurisdiction settled by a final decree.'

"We are not to be understood as holding that the court might not quash a service by publication, if the bill upon its face showed that it was clearly a common law action, and that the resort to the equity side of the Court was a subterfuge; the bill before us does not present that case.

"The order is affirmed." (Italics ours).

The foregoing decision was an adjudication by the Florida Supreme Court that the court, in the proceedings set up in the additional pleas herein, had jurisdiction in the premises. Therefore, under the rule as laid down in C. R. I. & P. R. Co. vs. Sturm, 174 U. S. 710, 43 L. Ed. 1144, this Court should give "full faith and credit" to the decree.

The theory on which the respondent attacks the validity of the decree set up in the plea in question, is fallacious and unsound, unsupported by reason, justice or authority. This theory is, that according to one of the twelve maxims, equity acts in personam; that the decree set up in the plea is a chancery decree; that, therefore, it must be a personal decree and consequently void for want of personal service. Counsel for respondent contends that in the absence of the statute, equity can only act *in personam* and that no statute in Florida exists authorizing the decree under consideration.

The major premise of respondent's syllogism,

viz, that equity acts only in personam, is unsound and its conclusion must necessarily fall with it.

The many cases already cited in this brief in themselves constitute an unanswerable refutation of this theory. They show that equity does act *in rem* in so far as is necessary to justify service by publication. The maxim, "Equity acts only *in personam*, and not *in rem*," is not to be taken too literally. It was a statement made at the time when Chancery jurisdiction was first exercised to allay the jealousy of the common law courts, which feared the usurpation of their powers by the Chancellors. The maxim stated that equity would act *in personam*, on the consciences of the parties, and thus perform a duty impossible for the courts of law to fulfill. However, it was seen, from the necessities of the case, that equity could not act entirely *in personam*, and although the maxim was retained, and still applies, in a limited sense, yet equity decrees are in a large part, *in rem* and not *in personam*. This is pointed out by all the recognized authorities on equity jurisprudence.

We quote from Vol. 1, Pomeroy's Equity Jurisprudence, (3rd Ed.) Sec. 134-135, as follows:

> "Some writers have argued that the equitable jurisdiction is to be regarded as wholly remedial, and that equity itself does not create any rights of property or other primary rights, because the Courts of Chancery, as they say, only act in personam against the parties and never in rem upon the subject matter of a judicial controversy. It is said that a decree of the court never operates by virtue of its own in-

herent efficacy to create or to transfer an estate, right or interest; that such decree never executes itself nor furnishes any means or instrument by which it may be executed without the intervention or act of the party against whom it is rendered; that the plaintiff in equity never merely by means of the decree in his favor ever recovers possession of the land or *other subject matter*, or becomes invested with the title to or estate therein; and that the court simply orders some act to be done, a conveyance to be executed, an instrument to be surrendered up and cancelled, possession to be delivered and the like, and then merely uses a moral coercion upon the defendant by means of fine and imprisonment to compel *him* to do what is asked to be done in the judgment. This radical difference between the effect of the decree in equity and a judgment at law, it is urged, shows that there are no equitable primary rights, no equitable estates or interests distinct and separate from the rights to obtain such remedies as are administered by the Court of Chancery."

After giving the views of some writers in the language above quoted, the same author (Pomeroy) comments on the view as follows:

"There may be some plausibility in this argument on its surface, but when it is examined with care and under the light of history, all its force disappears. The early Chancellors from prudential motives alone and to avoid a direct conflict with the common law courts, adopted this method of acting, as they said upon the consciences of defendants; and the prac-

tice which they invented has with the English national devotion to established forms, continued to modern times. *But it is certainly a complete confounding of the essential facts with the external form to say that such a method of procedure, adopted solely from considerations of policy, determines the nature of the equity jurisdiction and demonstrates the non-existence of any equitable primary rights, estates and interests.* (Italics ours). If there has been any *necessary* connection between the proceedings and remedies of the Chancery and this mode of enforcing its decrees in personam, if it had been intrinsically impossible to render these decrees operative in rem, then the argument would have had some weight but in fact there is no such connection, no such impossibility, and the decrees of the court of equity may be made to operate in rem to the same extent and in the same manner as judgments at law."

Up to this point in the statement of the law by Mr. Pomeroy, no reference is made to any statutory enlargement of equity jurisdiction. However, he follows the statement just quoted with the further statement, as follows:

> "Furthermore, whatever of plausibility there might be in the theory as applied to the English Court of Chancery has been entirely destroyed by the legislation of this Country. The statutes of the several states have virtually abolished the ancient doctrine that the decrees in equity can only act upon the persona of a party, etc."

It is clear, however, from Mr. Pomeroy's exposition as above quoted, that regardless of any statutory enlargement of equity jurisdiction, equity does in fact act *in rem*, as well as *in personam*.

We quote again from Section 429, page 710, Volume 1 Pomeroy, as follows:

> "*In what sense equitable remedies do operate in rem:* It has also been shown when explaining the nature of equitable remedies that they generally are in another special sense essentially in rem and not in personam. Equitable remedies very seldom consist of personal judgments, general recoveries payable out of defendant's assets. The fundamental theory of the remedial action of equity is, that it deals with specific and identified land or *chattels* or *specific funds*, whether consisting of securities and other things in action or of money and it seeks to determine, declare and maintain the estates, interests and rights of the litigant parties in and to such identified lands, chattels, or funds."

In the third edition by the same author in Volume 1, at page 196, it is stated:

> "The maxim referred to (that equity acts only in personam) has therefore a very limited application. When we turn from this mere external manner in which equitable remedies were enforced according to the original chancery procedure to the essential, and so to speak, internal nature and qualities of the remedies themselves, instead of their being merely personal, it is one of the distinct and central principles of the equity remedial system that it deals

with property rights—estates, interests, liens,—rather than with mere personal rights and obligations of the litigant parties. This tendency of equity to base its remedies upon the rights of property, in their various grades, from complete estates to liens or charges is exhibited in the clearest manner in all its suits brought to enforce the rights and duties growing out of contracts. Although the contract is executory, even though it stipulates only with respect to things not yet in existence,—things to be acquired in the future—the remedial right is worked out by conceiving of a present ownership, interest, lien or charge arising from the executory provisions or a present possibility which will ripen into such an interest, and by establishing this proprietory right, protecting and enforcing it."

And continuing on in the same section, the author clearly demonstrates that equity in a peculiar way deals with rights or interests in property and shapes its relief accordingly without much regard to the personal rights of the plaintiff and the personal obligations of the defendant—or rather by passing over them in its decree.

In Bispham on Equity, the author, after setting forth the maxim that equity acts *in personam*, points out the limitations on its application, and expressly states that equity acts *in rem* where the *res* is in the jurisdiction of the court although the defendant is a non-resident and personal service on him is impossible. At page 75 it is said:

"The maxim that a court of equity acts in personam must not be understood to mean that

the jurisdiction of the chancellor extends to rights of action for personal injuries. The reverse is the case. The subject of the jurisdiction of courts of equity is *property*—not *persons*. Their process is directed against persons and sometimes against property; but there must be some right of property involved in order that the jurisdiction of the court may attach. This subject will be noticed hereafter; but reference may be made in this connection, to the refusal of courts of chancery to entertain any bill to recover damages for purely personal torts.

"It may not be out of place, moreover, to mention here the rule applicable when the res happens to be within the jurisdiction, and the person whose rights in the res are sought to be affected by the decree is a non-resident. In such cases, at all events for certain purposes, the court will exercise jurisdiction over the thing although personal service upon the defendant may not be possible—whenever service by publication, in lieu of personal service, is authorized by statute. Cases not infrequently arise where it is necessary that the title to real estate should be perfected by getting rid of an outstanding claim. The title to land may be clouded by the existence of an alleged right which the holder declines, presently, to assert. There is, as we shall see hereafter, a jurisdiction in courts of chancery to remove a 'cloud' upon the title. This power may be exercised if the land is within the process of the court, although the party affected may be beyond its limits."

The theory advanced by counsel for plaintiff

(respondent here), that equity can act only *in personam;* that consequently it cannot enter a decree *in rem* which can be based on service by publication, is not original. It has many times, in similar cases been offered to the Courts, but in each instance it has met with a cold reception. In Amparo Mining Co. vs. Fid. Trust Co. (N. J.) 71 At. 605, heretofore quoted, the court disposed of the theory as follows:

> "In the present case the res is personal property. It does not follow that because anciently an equity decree affecting real estate operated only in personam, and did not proprio vigore transfer or establish title, that such decrees affecting personal property within the jurisdiction of the court were in the same way limited in their practical operation. Assuming that formerly in neither case did the decree establish title but only the right of the complainant to receive a title, the important distinction still remains that in the case of real estate title did not pass upon delivery of possession, whereas in the case of chattel property it did. Anciently the Court of Chancery would not give to a successful complainant, in a suit for specific performance of a contract to convey real estate, a writ of assistance to put him in possession, because no legal title would be thereby established. The same difficulty does not exist in the case of chattels. The argument to sustain the plea in this case seems to assume that a party complainant, who has obtained a final decree in this court establishing his equitable title to chattels in possession of a defendant holding legal title thereto, and who in pursuance of such decree has actually obtained

possession, has no legal title, and will have none until the defendant has voluntarily, or under the compulsion of the court, executed a conveyance. The general principle, I think is now recognized that a bare legal title to chattels cease to exist when the holder of a complete equitable title takes possession for the reason that such possession creates a legal title. Kronson v. Lipschitz, 68 N. J. Eq. 367, 60 Atl. 819 (1904). Such certainly must be the effect of the union of a complete equitable title and possession, when the only right or duty in respect of the chattels remaining in the original holder of the legal title is to convey the same to the holder of the equitable title. Possession of a chattel under a complete equitable title in such a case must make a complete legal title."

There can be no question of the jurisdiction of courts of Chancery over proceedings such as are disclosed in the pleas under consideration. The cases cited herein where similar decrees have been entered and upheld, amply substantiate this proposition. Equity having jurisdiction as the authorities all show, to declare the trust and adjudicate the title to the funds involved, the State had the power to provide for substituted service against non-residents by publication. The Florida Statute concerning service by publication (Gen. Stat. 1866) (Rev. Gen. Stat. 3111; year 1920) is unlimited. It provides for service by publication in all chancery cases. On page 53 of the Transcript we see that the Florida Supreme Court in Rome Insurance Co. vs. Corbett,

63 So. 833, construed this, its own statute, as follows:

> "Our constructive service statute is broad enough to apply to any suit in equity pending in our Circuit Courts."

It is not material to quote the entire section here, as it deals with the mechanism of obtaining service by publication. It commences:

> "Whenever the complainant, his agent or attorney, shall state in a sworn bill or affidavit, duly filed, the belief of the affiant that the defendant is a resident of a state or country other than this state—"

and continues to describe the process of mailing, posting, publishing, etc. The word "whenever" is the only limitation on the operation of the section, and as we have seen, the Florida Supreme Court has held it broad enough to cover any equity action. So has the United States Circuit Court for the Southern District of Florida. In Morris vs. Graham, 51 Fed. 53, the court said:

> "The general principle of equity gives to the courts of this state powers to investigate questions of cloud of title, with power to quiet the title to lands involved and to remove therefrom alleged liens, and no special statute was required for that purpose. Holland v. Challen, 110 U. S. 15, 3 Sup. Ct. Rep. 495. The state has by statute authorized and provided for publication and service to carry into effect the rights before existing in a court of chancery."

So in this case. The courts of equity have power to investigate fraud, establish and enforce trusts, without any special statutory enactment for that purpose. The State, by its constructive service statute (Gen. Stat. 1866 supra) (Rev. Gen. Stat. 3111; year 1920) has authorized service by publication to carry into effect the rights and powers of its Chancery courts.

The Supreme Court of the United States has passed upon this contention in Arndt vs. Griggs, 134 U. S. 316, 33 L. ed. 918, which concerned the powers of a Chancery Court to clear title to land within its jurisdiction when the defendant was a non-resident served by publication. It was held that the State has control over the property within its borders and could provide, as by service by publication, reasonable methods of imparting notice to non-residents. The Court said:

> "The propositions are, that an action to quiet title is a suit in equity; that equity acts upon the person; and that the person is not brought into court by service by publication alone.
>
> "While these propositions are doubtless correct as statements of the general rules respecting bills to quiet title, and proceedings in courts of equity, they are not applicable or controlling here. The question is not what a court of equity, by virtue of its general powers and in the absence of a statute might do, but it is. What jurisdiction has a State over to titles to real estate within its limits, and what jurisdiction may it give by statute to its own courts, to determine the validity and extent of the

> claims of non-residents to such real estate? If a State has no power to bring a non-resident into its courts for any purposes by publication, it is impotent to perfect the titles of real estate within its limits held by its own citizens; and a cloud cast upon such title by a claim of a non-resident will remain for all time a cloud, unless such non-resident shall voluntarily come into its courts for the purpose of having it adjudicated. But no such imperfections attend the sovereignty of the State. It has control over property within its limits and the condition of ownership of real estate therein, whether the owner be stranger or citizen, is subject to its rules concerning the holding, the transfer, liability to obligations, private or public, and the modes of establishing titles thereto. It cannot bring the person of a non-resident within its limits — its process goes not out beyond its borders — but it may determine the extent of his title to real estate within its limits; and for the purpose of such determination may provide any reasonable methods of imparting notice."

To the same effect is Grannis vs. Ordean, 234 U. S. 385, 58 L. ed. 1363.

In these two cases the property concerned was real estate, but the reasoning of the opinions applies equally well to personal property. The State has undoubted jurisdiction over property within its borders. Its courts of equity have equally undoubted jurisdiction to establish and enforce trusts and to relieve from fraud. Therefore a decree establishing and enforcing a trust resulting because of

a fraud, in personal property within its jurisdiction is valid even though non-residents claim title to such property, if, as in this case, proper notice by publication is given, as provided by statute. Every authority and every case cited in this brief refutes the theories of counsel for plaintiff and shows beyond question that the decree set up in the plea under consideration is valid.

In Rothschild vs. Knight, 184 U. S. 341, 46 L. ed. 580, 22 Sup. Ct. 393, it was held that an insolvent's assignee may seize by trustee process a debt due a non-resident defendant, which is alleged to be a fraudulent preference.

This principle was again stated in King vs. Cross, 175 U. S. 399, 20 Sup. Ct. 132, 44 L. ed. 213, which held:

> "A garnishment of a resident debtor to reach a debt due to a non-resident defendant *who has no property subject to the jurisdiction of the Court*, does not deprive him of property without due process of law." (Italics ours).

In the light of the foregoing decisions there can be no question but that the Circuit Court of Appeals erred when it decided (Transcript, p. 74):

> "There being no *res* in the control of the Circuit Court of Hamilton County, jurisdiction was not conferred on that court over non-resident defendants by substituted or constructive service."

There *was* a *res*, and it was in the control of the Court. The deposits, the original notes for which

the certificates had been issued, were still unpaid and in the possession of The Bank of Jasper, in Forida. They, in themselves constituted the *res*. But in addition there was the *indebtedness* owing by the Jasper bank to the respondent. As the Circuit Court of Appeals said in its opinion (Transcript p. 76), the certificates of deposit created the same liability on the maker as imported by a promissory note. It was on this indebtedness, which the Circuit Court admitted existed, that the jurisdiction of the State Court was based.

The proceedings were not strictly garnishments, but they were analogous thereto. The debtor was within the control and jurisdiction of the Court. A dispute arose as to how the indebtedness should be administered. The complainants in the State Court claimed that the debt should be paid to them, instead of to the respondent. This is essentially the theory of garnishment. The situs of the debt being at the home of the debtor, as held in the cases cited *supra*, that is, in Hamilton County, Florida, the Circuit Court of that county had jurisdiction to administer the rights and claims thereto without obtaining personal service on the non-resident creditor.

The proceedings, while not strictly *in rem*, which are proceedings directly against property itself, are yet actions *in rem* in the broader and more general sense, which includes actions where no preliminary seizure is made, but the purpose of which is solely to try the right of title to property or indebtedness within the Court's jurisdiction. This class of actions is often designated as proceedings *quasi in rem*, but

they partake of all the characteristics of, and are really, actions *in rem*.

Pennoyer vs. Neff, 95 U. S. 714, 24 L. ed. 565.

Freeman vs. Alderson, 119 U. S. 185, 30 L. ed. 375.

1 Ruling Case Law 328.

Aside from the fact that the proceedings in the State Court were proceedings *in rem*, and jurisdiction of the person of non-resident defendants was unnecessary, there is the further consideration, already pointed out, that in the suits in question, the Court did have jurisdiction over the person of respondent, because by appealing to the Florida Supreme Court, it in effect entered a general appearance.

D—THE DECREES ENTERED IN THE STATE COURT CONSTITUTED A COMPLETE DEFENSE TO THIS ACTION BROUGHT IN THE FEDERAL COURT.

Petitioner in the trial court, in this action brought on the certificates of deposit, properly pleaded the decrees entered in the State Court declaring the certificates void. (Transcript pp. 7 to 17). The Circuit Court of Appeals, in deciding that the trial court erred in overruling respondent's demurrer to the pleas, held that the decrees constituted no defense because: (1) the State Court had no jurisdiction in entering the decrees, (Transcript pp. 72 to 75); and (2) the effect of the decrees, even if the State Court had jurisdiction, was not to declare them absolutely void, (Transcript pp. 75 to 77).

We have already shown that no question of jurisdiction of the State Court can be raised, because in the first place, the proceedings were *in rem* and personal service was not necessary; and in the second place, had jurisdiction of respondent's person been necessary, the State Court had it by reason of the fact that respondent conferred jurisdiction over its person by availing itself of the Court's jurisdiction and prosecuting an appeal.

Turning now to the final ground of the Court of Appeal's decision, we see that the effect of the decrees was in fact to declare the certificates of deposit absolutely void, and they undoubtedly constituted a perfect defense to the action on the certificates.

We first wish to point out that it was not proper for the Circuit Court of Appeals to consider the question of the *effect* of the decrees. That question was not before it. The only question before it was the *validity* of those decrees, which validity turned on the question of the State Court's jurisdiction. The effect of the decrees, if valid, was in effect *admitted* to constitute a defense, for no question on that score was raised. The only objection raised by respondent in the trial court to the sufficiency of the decrees as a defense, was the claim that the decrees were void because they were entered by a court having no jurisdiction. It was not proper for the appellate court to consider objections not raised by the parties in the trial court. Its only power was to review the questions raised and passed upon in the lower court, and not to consider the pleadings *de novo*.

The only pleadings before the Circuit Court of Appeals were petitioner's pleas of *res adjudicata* and respondent's demurrer and replication to those pleas. In none of these pleadings was it contended that the effect of the decrees, if valid, was not to bar the action. The only objection raised to the pleas by respondent's demurrer and by its replications, was that the decrees were entered in suits *in personam*, and that the State Court in those suits had no jurisdiction over the person of the respondent. This was the only question raised by the pleadings. It was the only question argued by the parties. It was the only question which should have been considered by the Court of Appeals.

It is true, that the first ground of respondent's demurrer to the pleas, (Transcript, p. 17) was that the plea "sets up no defense to the cause of action alleged in said count." This general ground of demurrer under the practice in Florida, which governed the trial court under the Conformity Act, is a nullity. It amounts merely to a repetition of the demurrer and calls nothing to the attention of the Court.

The Supreme Court of Florida, in Heathcote vs. Fairbanks-Morse Co., 60 Fla. 97, 53 So. 950, held:

> "A ground of demurrer to a plea that the same 'fails to state any sufficient defense to the plaintiff's cause of action' in effect merely repeats such demurrer and avers that such plea is bad in substance and is not a compliance with the statute requiring the substantial matters of law to be argued to be stated."

All the other grounds of the demurrer were directed to the jurisdiction of the State Court in entering the decree, and the replications (Transcript pp. 21 to 57) were devoted entirely to the same objection. Therefore, the effect of the decrees, if valid, was never raised in the trial court, and should not have been considered by the Circuit Court of Appeals.

The rule concerning the necessity of making objections in the trial court in order that they may be made in an appellate court is well stated in 3 Corpus Juris, 892, where it is said:

> "Only objections or grounds of objection urged in the trial court will be considered on

appeal. The party will not be permitted to change them or add others. The appellate court is not a forum in which to discuss new points, but merely a court of review to determine whether the rulings of the court below, *as presented*, were correct or not." (Italics ours).

In the case of Belk vs. Meagher, 104 U. S. 279, 26 L. ed. 735-739, at page 739, the Court said:

> "Nothing which occurred in the progress of the trial below can be assigned for error here which was not brought to the attention of the court and decided by it."

As this Court said in Robinson & Co. vs. Belt, 187 U. S. 41, 47 L. ed. 65:

> "*While it is the duty of this court to review the action of subordinate courts, justice to those courts requires that their alleged errors should be called directly to their attention, and that their action should not be reversed upon questions which the astuteness of counsel in this court has evolved from the record. It is not the province of this court to try these cases de novo.*"

An examination of the transcript of the record in the cause reveals that question as to the sufficiency of decrees as a defense, if valid, was never raised by the parties. Except as to their legality, no objection was made to them. The only place in the record where their effect, as a defense, granting their legality, was even suggested, appears in the opinion of the Circuit Court of Appeals.

In the case of Wood vs. Weimar, 104 U. S. 786, 26 L. ed. 779-782, at page 782, the court said:

> "The rule is universal that nothing which occurred in the progress of the trial can be assigned for error here, unless it was brought to the attention of the court below, and passed upon directly or indirectly."

In the case of Bort vs. E. H. McCutchen & Co., 187 F. 798, 109 C. C. A. 538, decided by the United States Circuit Court of Appeals for the Eighth Circuit, the court in effect holds:

> "A writ of error presents for review nothing but the alleged errors of law into which the court below has fallen, and a contention which was never presented to nor ruled upon by that court is not before the appellate court for consideration or decision."

Besides being improper, the action of the Court of Appeals in deciding against the effect of the decrees as defenses, was erroneous. The decrees constitute an absolute defense to this action on the certificates of deposit.

By the decrees pleaded, (Transcript pp. 7 to 17) it appears that the certificates of deposit concerned had been issued to cover and include the proceeds of certain notes executed by the complainants in the suits in the State Court. The State Court decreed:

(a) That the proceeds of the notes belonged to the complainants.

(b) That the American Bank and Trust Company had no right, title, interest, claim, or demand of, in and to the proceeds of said notes.

(c) That the defendant Bank of Jasper (petitioner here) be directed to pay the proceeds of the note to the complainants in those suits.

(d) That the certificates of deposit, in so far as they covered the proceeds of the note were void, and of no effect.

There being no question as to the jurisdiction of the State Court to enter the decrees, suits could not be maintained on the certificates of deposit after the decrees were entered. The question of the petitioner's liability on the certificates was *res adjudicata*. It had already been compelled to pay the amounts represented thereby to persons other than the respondent, and respondent was specifically decreed to have no interest therein or right thereto.

What better defense to the action in the lower court could be conceived, than the existence of these decrees. It is a fundamental principle that matters should be litigated but once, and once a competent court has passed on questions in dispute, they must be forever at rest.

But the Circuit Court of Appeals took it upon themselves (although respondent was content with the effect of the decrees if valid, and only asked that Court to pass upon the question of their validity) to decide that the decrees were insufficient as a defense because they merely established the fact that the non-residents had no right in the "supposed" fund in the Jasper Bank, and did not hold that the Jasper Bank was not personally liable on the certificates.

But the decrees *do* pass on the personal liability

of the Jasper Bank on the certificates of deposit. The certificates represented the proceeds of certain notes, and the Jasper Bank was enjoined from paying those proceeds—in other words the amounts of the certificates to American Bank and Trust Company, *or to anyone for it*, (Transcript, pp. 11 to 17). Is this not an adjudication that the Bank of Jasper should not be liable on the certificates to American Bank and Trust Company or its endorsees?

The decrees further adjudge that the certificates of deposit are *void and of no effect*. Is not this an adjudication that the Bank of Jasper should not be personally or otherwise liable thereon? How can one be liable on a void instrument—on something that has no existence?

But the Circuit Court of Appeals said the decrees did not declare the certificates void absolutely, but only in so far as they covered and included the proceeds derived from the notes (Transcript, p. 76). *But there is nothing to show that the entire amount of the certificates did not represent the proceeds of the notes.*

It is true the decrees adjudge the certificates void only in so far as they covered and included the proceeds of the notes, but the record shows that the entire amount of the certificates consisted of the proceeds of the notes. The certificates were issued to cover such proceeds and there is absolutely no showing made that one cent of the amount represented by the certificates consisted in anything other than such proceeds.

If, as a matter of fact, only a part of the amounts

represented by the certificates consisted of the proceeds of the note, and if a part of the amount consisted of other deposits, *it was incumbent on the respondent to show it.* The petitioner's pleas of *res adjudicata* (Transcript, pp. 7 to 17) allege that the certificates of deposit *represent and cover* the proceeds of the notes mentioned in the decrees. This allegation is not denied. The replications of respondent (Transcript, pp. 21 to 57) do not say that the certificates only partially cover the proceeds of the notes. They are concerned only with the jurisdiction of the Court in entering decrees and by their silence, admit that the certificates represented the proceeds of the notes and that therefore the decrees adjudged them totally void and of no effect.

As the pleadings show that the certificates cover only the proceeds of the notes, they show, therefore, that the certificates were declared absolutely null and void. No action could, therefore be maintained on them and the decrees pleaded constituted perfect defenses to the action.

CONCLUSION

We believe that it has been clearly demonstrated that the Circuit Court of Appeals erred in its decision of this case, and that the decree of the District Court was proper, the latter being in consonance with the decision of the Supreme Court of Florida, for the following reasons:

1. The proceedings in the State Court were proceedings *in rem* and jurisdiction over the person of the non-resident defendant was not necessary.

2. The prosecution of an appeal under the Florida practice constitutes a general appearance.

3. The State Court had jurisdiction over the person of the respondent by reason of its voluntarily availing itself of the State Court's jurisdiction to prosecute appeals therein.

4. The only question before the Circuit Court of Appeals was the one of the State Court's jurisdiction to enter the decrees pleaded.

5. The effect of the State Court's decrees was to declare the certificates of deposit absolutely void and to bar further action thereon.

We submit that the judgment of the United States Circuit Court of Appeals for the Fifth Circuit should be reversed; and that the judgment of the United States District Court for the Southern District of Florida should be sustained.

Respectfully submitted,

F. P. FLEMING,
C. SEATON FLEMING,
Attorneys and of Counsel for Petitioner.

FILE NO. 27,741

IN THE

Supreme Court of the United States

October Term, 1920

No. 384

THE BANK OF JASPER,
A CORPORATION,

Petitioner,

vs.

THE FIRST NATIONAL BANK OF ROME,
A CORPORATION.

Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION TO APPLICATION FOR CERTIORARI

HENRY C. CLARK,
Attorney and Counsel for Respondent.

W. E KAY,
J. L. DOGGETT,
Of Counsel.

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IN THE

Supreme Court of the United States

THE BANK OF JASPER, A CORPORATION, *Petitioner.*	October Term, 1920
VERSUS	
THE FIRST NATIONAL BANK OF ROME, A CORPORATION. *Respondent.*	No. 384.

BRIEF FOR RESPONDENT IN OPPOSITION TO APPLICATION FOR CERTIORARI

STATEMENT OF THE CASE

Since petitioner's brief contains no statement of the case, except as might be incompletely gleaned from the petition for writ of certiorari, we present such statement, which includes certain important facts not mentioned in the petition.

This is a purely private controversy in which no final judgment has been rendered. Under the decision of the Circuit Court of Appeals, this case awaits trial in the District Court. Furthermore, when this case is sent back to the District Court for trial, there are a number of pleas and replica-

tions which were withdrawn under stipulation, but which petitioner may then refile (R. 156).

This is a common law action in which the respondent bank, a foreign corporation citizen of Georgia, seeks to recover from the petitioner bank, a citizen of Florida, upon the several certificates of deposit described in and attached to the several counts of respondent's declaration (R. 9).

There is but one plea to each count at present standing in the record (R. 156). This plea sets up a purported decree of the State Circuit Court of Hamilton County, Florida, in Chancery, which decree attempts to cut off respondent's rights in and to the certificates of deposit sued on in the respective counts (R. 12). Respondent demurred to this plea contending that it was bad because the decree therein set forth was based on mere constructive service of process and yet the decree sought to operate *in personam*, (R. 61). The District Court over-ruled this demurrer (R. 64). In so doing the District Court rendered an opinion in the case of *First National Bank of Jasper, Florida vs. The First National Bank of Rome, Georgia*, (No. 372), which is found at page 42 et seq. of the transcript of record in that case.

Respondent filed one replication to petitioner's plea to each count (R. 66). This replication sets forth in detail every step of said chancery suit in the Florida State Courts in so far as respondent in any way participated therein, and shows the total invalidity of said decree attempting to cut off respondent's rights. Petitioner demurred to this replication which demurrer was sustained (R. 148). The District Court in sustaining this demurrer announced that "the questions attempted to be raised

by these replications are questions passed upon by this Court in its ruling upon the demurrer to the pleas. I adhere to the ruling then made." (R. 155).

There was and could have been no showing in said chancery suit that respondent foreign corporation bank was doing business in Florida, or had any representative in Florida upon whom service was or could have been made. The only semblance of service of process was by publication.

Looking at the proceeding in said chancery suit as set forth in said plea and replication, it is seen that both the original and amended Bills of Complaint therein, by their very allegations, preclude any contention that said equity suit was *in rem*, for in both of said Bills it was distinctly alleged that said certificate of deposit was void, and the Bills prayed for a decree declaring the certificate of deposit to be void (R. 82, 96); that every pleading or other paper of any kind filed by the respondent in said chancery suit was limited and recites that the respondent was "not appearing generally but appearing specially, solely and only and limiting this appearance to what in contemplation of law amounts only and solely to a special appearance;" that respondent filed two motions to quash the attempted service upon it, the second motion being filed after an amendment to the bill of complaint; each of these motions were denied; that thereupon "special appeals" were sued out in two chancery cases, and stipulations filed in fourteen other chancery cases that the decision of the Florida Supreme Court in the two cases should be decisive of the validity of the service in the fourteen cases, *but that the stipulations shall not be considered as constituting a general appearance;* (that there were sixteen chan-

cery cases in all will appear by an examination of the four transcripts now before this Court in the instant and its three companion cases); a second stipulation was entered into in the chancery cases which further emphasizes that these special appeals did not constitute a general appearance, this second stipulation being appended to the notice of application for supersedeas and reading "We agree that this notice shall in no sense operate as a general appearance in the above case;" and is signed by the then counsel for complainant (R. 111); that after the ruling of the Supreme Court of Florida, no further participation was taken by respondent in said chancery cases; that nevertheless the Florida Circuit Court proceeded to enter a final chancery decree purporting to take away valuable rights of the respondent.

The United States Circuit Court of Appeals reversed the District Court.

Petitioner asserts a conflict between this decision and the decision of the Florida Supreme Court in *Rome Insurance Company et al. v. J. H. Corbett*, 66 Fla. 438, and upon such assertion applies to this United States Supreme Court for a writ of certiorari.

Respondent (1) denies that such conflicts exist and (2) contends that even if the asserted conflict were a fact, it would be of such nature that the Federal Court would exercise its own independent judgment.

We shall (1st) determine the nature of the State Court suits, (2nd) analyze the asserted conflict between the Federal and State Court, and (3rd) consider whether a cetriorari should be granted.

ARGUMENT

I.

THE STATE COURT SUITS WERE NOT IN REM

A. No Res Existed, Under Allegations of Bill.

Counsel for petitioner, First National Bank of Jasper, contents himself with claiming that the State Court suits were merely "*quasi in rem.*" (Mr. Hampton's brief p. 17. See also Mr. Fleming's brief p. 19). Counsel for petitioner, Bank of Jasper, admits that the alleged *res* was "a supposed indebtedness," (Mr. Fleming's brief p. 13).

This "supposed indebtedness" is the only simulation of a *res* that the ingenuity of petitioner's counsel has been able to evolve. Petitioner could go no further, for *if anything stands out conspicuously in the State Court cases it is the denial of this indebtedness.* This denial appears in the original bill, the amended bill, and in the decree of the State Court. Petitioner is estopped from asserting anything but that the "supposed" *res* was nonexistent.

Petitioner's counsel refer to many cases of attachment and of garnishment. In such cases, the indebtedness attached or garnished is real—does actually exist. If the indebtedness attached or garnished turns out to be merely a "supposed indebtedness," there is nothing to attach or garnish and the attachment or garnishment fails.

There must be a "real, not an imaginary" *res* to furnish the base for a proceeding *in rem.*

> *Chase v. Wetzlar*, 225 U. S. 79, 89, 56 L. Ed. 990, 995.

The counsel now representing petitioner were not counsel in the State Court cases, nor during the earlier stages of the present suit. When these counsel came into this case, respondent was vigorously and affirmatively asserting the validity of its certificates of deposit, and its right to collect thereon. As a consequence, the present counsel for petitoner have not been able to look at the State Court cases through the eyes of one who prepared them, fought through them and claimed from the start that respondent's certificates of deposit were void. *PETITIONER'S COUNSEL* claim the certificates of deposit are void by virtue of the State Court decree. *THEIR CLIENTS* claimed these certificates of deposit were void from the moment the first bill was filed in the State Court. This original claim removes and destroys even the possibility of there being a *res* in the State Court cases.

Petitioner cannot blow hot and cold. *Allegans contraria non est audiendus.* It cannot both affirm and deny. It cannot deny an indebtedness or *res* in the State Court, and, under the same facts, avow an indebtedness or *res* in the Federal Court. We have here an estoppel by record. Petitioner made his bed in the State Court and must lie on it. Changing counsel will not enable petitioner to transform a denial into an affirmative.

In *Davis v. Wakelee* 156 U. S. 680, 39 L. Ed. 578, this Court said:

"When a party assumes a certain position in a legal proceeding and succeeds in maintaining that position, he may not thereafter, simply because his interests have changed, assume a contrary position."

To this point see also:

Brooklyn City & Newtown Railroad Company v. National Bank of the Republic, 102 U. S. 14, 26 L. Ed. 61,
Daniels v. Tearney 102 U. S. 415, 26 L. Ed. 187,
Pease v. Rathbun-Jones Engineering Company, 243 U. S. 273, 61 L. Ed. 715,
Norfolk Southern Railway Company v. Chatman 244 U. S. 276, 61 L. Ed. 1131.

Counsel have failed to show any sort of seizure, attachment, sequestration or impounding of even the "supposed indebtedness" by the State Court. There was none. To stretch out the hand to seize a "supposed" *res* leaves the hand empty. But the State Court did not even reach out its "strong arm."

In *Loiza vs. Superior Court of San Francisco*, 85 Cal. 11, 20 Am. St. Rep. 197, 9 L. R. A. 376, the case principally relied upon by petitioner as a precedent for the State Court suits, and the case referred to in the opinion of the District Court (R. 44 of case No. 372), a receiver was appointed who actually took possession of certain property. No receiver was prayed for in the instant case, and for good reason. What funds could a receiver have identified and taken charge of as representing this "supposed indebtedness?" Certainly it is not to be thought that the petitioner bank had

segregated a specific lot of funds with which to meet payment of the obligation to respondent due "in current funds." And had petitioner done this, it could not thereby affect respondent's rights under its certificates of deposit.

The real and only purpose of the State Court suits as against this respondent was to cancel and decree to be void the certificates of deposit herein sued upon (see third ground of petition for certiorari). In the absence of any showing to the contrary, it will be presumed that these certificates of deposit were in the possession of respondent in its banking house in Georgia. Yet when this foreign corporation bank comes into the United States Court to collect upon these certificates, it is met by a State Court decree purporting to adjudicate that it holds merely a void scrap of paper.

In *Stockbridge v. Phoenix Mutual Life Insurance Co.*, 193 Fed. 558, 559-560 (Dist. Ct., D. Conn.), the court had before it a bill as novel as the bills filed in the Florida court, and regarding this bill the Federal Court pertinently said:

> "The petitioner has presented a very clever bill ————. The court ———— is bound to dissect and analyze, so that it may learn what is the real nature of the bill."

> "The absent defendant has, in law, a claim against the insurance company as the beneficiary under the two policies. The policies are merely statements on paper of what the contract was. The conditions precedent in the contract have been fulfilled, and payment on the contract is due. Is the claim a tangible, fixed, definite, and certain thing, with its situs here? It strikes me that Mrs. Ring-

> walt can assert and enforce her claim against the insurance company without coming into this district. It is a claim which, from its inherent nature, is transitory, attaches to her person, and can be taken with her wherever she goes. It is like the contents of a handbag, in which she might carry the usual accessories of a journey. She is no more constrained to come to Hartford to make use of her claim than she would be to use the contents of the handbag. It is a thing subject to constant shifting, changing, and uncertainty. That the policies may have been within the district when the suit was brought was immaterial. She could press her claim in another forum in spite of their presence here. The papers upon which the contracts of insurance are written are not the essence of the contention which this suit presents."

The State Court suits are an anomaly. They are a patent attempt by local citizens to rush into a local State Court and attempt to destroy past due negotiable instruments held by citizens of another State. The only case even slightly in point which counsel have been able to cite in support of their right to do this is *Loaiza v. Superior Court of San Francisco, supra*, but in that case, the notes, mortgages and gold coin in suit were within the jurisdiction of the California court and taken into custody by a receiver, under direction of a court order. Here the certificates of deposit were in Georgia and the indebtedness represented thereby asserted in the bills of complaint to be void. No court has ever held that such a suit was *in rem.*

B. Equity Acts In Personam.

The fact that respondent claims the right to collect its certificates of deposit out of "current funds" of petitioner did not authorize a decree against respondent upon mere constructive service, assuming for the moment that "current funds" could constitute a *res*. While only the certificates of deposit issued by the First National Bank of Jasper used the language "payable in current funds," yet this necessarily is all that the certificates issued by the Bank of Jasper could call for. No special fund was created, and certainly neither bank intended to or did set aside and keep idle a specific fund as represented by these certificates of deposit.

These State Court cases were in a court of equity.

Equity is a court of conscience. Its attention is directed primarily to the duty of the defendant, and it vindicates the right of the plaintiff through compelling the defendant to fulfill his co-relative duty, ordering him to do the very act he is under obligation to do, or to refrain from the very act he is under obligation not to do. Hence the maxim "Equity acts *in personam*."

While this power to act *in personam* upon the defendant in many ways enlarges the ability of the Chancellor to effect redress for the plaintiff, it also constitutes a specific limitation in other ways upon the jurisdiction of the Chancellor.

At no time throughout this litigation, has it been contended by the other side that any statute of Florida authorizes a chancellor to proceed *in rem* as against personal property. Furthermore in Florida, the courts have not developed by a

species of judicial legislation, any sort of spurious doctrine that will authorize a chancellor to act and adjudicate *in rem*, except where such authority is given him by statute.

Therefore, with neither a Florida statute nor a Florida decision authorizing a chancellor to act *in rem* in this case, it is not to be expected that this United States Supreme Court will undertake judicially to legislate regarding the powers of a court of equity in Florida.

The State Court suits are as closely analogous to a bill to remove a cloud on title as to any known form of procedure. It is settled that such a suit, in the absence of a statute, is *in personam*, and a non-resident defendant served merely constructively is not bound by a decree therein entered; *Hart v. Sansom*, 110 U. S. 151, 28 L. Ed. 101.

In *Boswell's Lessee v. Otis, et al.*, 9 How. 336, on page 350, 13 L. Ed. 164, 170, this Court said:

> "No principle is more vital to the administration of justice, than that no man shall be condemned in his person or property without notice, and an opportunity to make his defence. And every departure from this fundamental rule, by a proceeding *in rem*, in which a publication of the notice is substituted for a service on the party, should be subjected to a strict legal scrutiny. *Jurisdiction cannot be assumed and exercised in such cases upon the general ground, that the subject matter of the suit is within the power of the court.*" (Italics ours).

The leading case of *Baldwin v. Hale*, 1 Wall. 223, 234, 17 L. Ed. 531, holds, as stated in the opinion, page 534:

> "Insolvent laws of one state cannot discharge the contracts of citizens of other states, because they have no extra-territorial operation, and consequently the tribunal sitting under them, unless in cases where a citizen of such other state voluntarily becomes a party to the proceeding, has no jurisdiction in the case. *Legal notice cannot be given* and, consequently, there can be no obligation to appear, and of course there can be no legal defaults." (Italics ours).

An action for specific performance cannot, in the absence of a statute, be maintained by the courts of the State in which the property is located, against a non-resident served only constructively.

Hollingsworth v. Barbour, 4 Peters 466; 7 L. Ed. 922;
Texas Company v. Central Fuel Oil Co., 194 Fed. 1 (CCA 8th Cir).
Snell v. Hill, 263 Ill. 211, 105 N. E. 16;
Homer v. Ellis, 75 Kan. 675; 90 Pac. 275; 121 Am. St. Rep. 446;
Spurr v. Scoville, 3 Cush. 578;
Silver Camp Mining Co. v. Dickert, 31 Montana 488; 78 Pac. 967; 67 L. R. A. 940; 3 Ann. Cas. 1000.

We would also refer to the valuable discussion of the nature of equity decrees found in *Langdell's Equity Pleading*, 2nd. Ed. Sections 42 and 43, also note appended to Section 42, and found on pages 35 to 38, also Section 184. See also the clear discussion in *10 R. C. L.* 364 and 387.

An injunction operates only *in personam: Hitch-*

man Coal & Coke Co. v. Mitchell, 245 U. S. 229; 62 L. Ed. 260.

The nature of an interpleader suit is particularly noteworthy in determining the validity of the decrees of the Florida State Court. In an interpleader suit, the complainant places an actual specific fund in the very lap of the Court, and prays its adjudication as between the interpleaded defendants. Here might seem to be a *res*. But it is uniformly recognized that a non-resident defendant served only by publication is not bound by a decree which undertakes to cut off his rights:

New York Life Ins. Co. v. Dunlevy, 241 U. S. 518, 521; 60 L. Ed. 1140, 1142;
Bell v. Gunn, 94 Ga. 642; 21 S. E. 899;
Gary v. Northeastern Masonic Aid Assn. (Iowa), 50 N.W. 27;
Tremblay v. Aetna Life Ins. Co., 97 Me. 547; 55 Atl. 509; 94 Amer. St. Rep. 521;
Expressmen's Mutual Benefit Assn. v. Hurlock, 91 Md. 585; 46 Atl. 957; 80 Amer. St. Rep. 470;
Scharmann v. Union Pac. Ry. (Minn.) 175 N. W. 554;
Ward v. Bankers Life Co. 99 Neb. 812; 157 N. W. 1017;
Cross v. Armstrong, 44 Ohio State 613; 10 N. E. 160;
Washington Life Ins. Co. v. Gooding, 19 Tex. Civ. App. 490; 49 S. W. 123.

Cross v. Armstrong, supra, is an especially strong and well-reasoned case, and has been twice approved by this Court. In *Leigh v. Green*, 193 U. S. 79, 48 L. Ed. 623, 628, this Court said:

"When the proceedings are *in personam* the

> object is to bind the rights of persons, and in such cases the person must be served with process; in proceedings to reach the thing, service upon it and such proclamation by publication as gives opportunity to those interested to be heard upon application is sufficient to enable the court to render judgment. *Cross v. Armstrong*, 44 Ohio St. 613, 624, 10 N. E. 160."

Again, a still more important acceptation by this Court of the principles announced by the Ohio Court is found in *New York Life Insurance Co. v. Dunlevy*, 241 U. S. 518, 60 L. Ed. 1140, 1142, as follows:

> "The interpleader initiated by the company was an altogether different matter. *This was an attempt to bring about a final and conclusive adjudication of her personal rights*, (Italics ours), not merely to discover property and apply it to debts. And unless in contemplation of law she was before the court, and required to respond to that issue, its orders and judgments in respect thereto were not binding on her. *Pennoyer v. Neff*, 95 U. S. 714, 24 L. Ed. 565; *Shinn, Attachment & Garnishment*, Sec. 674. See *Cross v. Armstrong*, 44 Ohio St. 613, 623, 625, 10 N. E. 160."

A situation quite similar to the present case was passed upon in *Aetna Life Insurance Co. v. Lyon County*, 95 Fed. 325, at page 331, where it is said:

> "Much reliance is placed by the defendant upon a decree rendered in a case entitled *Anderson v. Insurance Co.* (Iowa) 55 N. W. 348, by the district court of O'Brien County, Iowa,

and affirmed on appeal by the state supreme court, which was a proceeding in equity brought by certain residents and taxpayers of O'Brien county to restrain the county treasurer from making any payments on the bonds negotiated by B. L. Richards, and to have the bonds adjudged to be illegal and non-enforceable, and in which case a decree to that effect was entered. It is shown upon the record that in that case service of the original notice therein was not had upon any one of the complainants within the state of Iowa, they being all residents of other states, and no appearance therein was entered for any of the complainants except the Orient Fire Insurance Company, and therefore the decree therein is of no force against any of the complainants, except the Orient Company; it being well settled that, in personal actions, the service of notice by publication, or by reading the process to the party, at a place outside of the territorial jurisdiction of the court, confers no jurisdiction over the party thus served. *Pennoyer v. Neff*, 95 U. S. 714; *Hart v. Sansom*, 110 U. S. 151, 3 Sup. Ct. 586. The adjudication in that case had no effect upon the rights of any of the complainants herein, except the Orient Company."

In *Brooklyn v. Aetna Life Insurance Co.*, 99 U. S. 362, 25 L. Ed. 416, Justice Harlan speaking for the Court said:

"The suit commenced and determined in the Circuit Court of Lee County was a proceeding wholly *in personam*, against the holders and owners of bonds and coupons which had been issued in the name of the Town, and delivered to the Railroad Company. Upon principle and authority, no decree therein rendered

could bind anyone not personally served with process, or who did not appear. It could not affect the rights of non-resident holders of bonds and coupons, proceeded against by constructive service. Such service, as to them, was ineffective for any purpose whatever. *Pennoyer v. Neff*, 95 U. S. 714, and authorities there cited."

To the same effect see:

Township of Empire v. Darlington, 101 U. S. 87, 25 L. Ed. 878.
Pana v. Bowler, 107 U. S. 529, 27 L. Ed. 424.

In two decisions, this Court has pointedly stated that "the foundation of jurisdiction is physical power:"

McDonald v. Mabee, 243 U. S. 90, 91, 61 L. Ed. 608, 609.
In the matter of Indiana Transportation Co., 244 U. S. 456. 457, 61 L. Ed. 1253, 1255.

Hence it follows that where the jurisdiction is *in personam*, such jurisdiction cannot exist unless founded on power over the person.

We submit that the Hamilton County Circuit Court was wholly lacking in power to enter a decree adjudicating respondent's rights under the certificates of deposit herein sued upon.

II.

NO CONFLICT BETWEEN FEDERAL AND STATE COURTS

A. Question Stated.

The question of procedure upon which petitioner asserts a conflict between the Federal and State Courts was admirably stated and determined in the opinion of the Circuit Court of Appeals as follows:

> "It is contended by defendant in error that the effect of appealing from an interlocutory order by the plaintiff in error (defendant in the Corbett case) was a general appearance on its part in that case, and conferred jurisdiction over its person on the circuit court on the remand of the case. The rule in Florida, differing from that which obtains in the federal courts, is to the effect that an appellant, though objecting to the sufficiency of service successfully, is considered in court upon the return of the case to the lower court. Conceding that this court will follow the rule of decision in the state court, in passing upon a judgment in that court, we think the Florida rule did not apply in the Corbett case. The question of its applicability was suggested, but not decided by the Supreme Court of Florida in its opinion in that case, because the appellee asked that the appeal be decided on another ground. The Supreme Court held that—
>
> 'If the statute be followed, there is no right in the non-resident to quash this notice (by publication); he has his right, if not waived, to object should the court

thereafter commit an error against him.'

"The order of the circuit court was for that reason affirmed, apparently leaving the sufficiency and effect of the substituted service to be determined by the character of relief awarded against the non-residents upon final decree. The appeal was from an interlocutory order of the circuit court, which affected only the question of service. *It was not an appeal from a final decree, upon which the insufficiency of service was assigned, with other error, as in the cases cited supporting the Florida rule.* (Italics ours). The Florida statute allowing appeals from interlocutory orders was held by its Supreme Court in the Corbett Case to cover an order affecting service only. No other question than the rightful presence of the non-residents in the circuit court by virtue of the substituted service was presented by the appeal.

"If the rule contended for applies to such an interlocutory appeal, then the Florida Legislature and its Supreme Court did a futile thing in providing a method of appealing from an order of the circuit court sustaining service, where the taking of the appeal itself by the party complaining of service alone puts the party in court as effectually as if properly served, and renders the appeal ineffectual for any purpose. *We are not prepared* TO EXTEND THE RULE IN FLORIDA *as to the effect as an appearance of the taking of an appeal from a final decree, upon which error based on the insufficiency of service was relied upon with others, to an appeal from an* INTERLOCUTORY ORDER, WHICH INVOLVED ONLY THE QUESTION AS TO WHETHER THE APPELLANT WAS RIGHTFULLY IN COURT, *as in the Corbett case.* (Italics ours).

"Conceding that there is no authority in

> the practice of Florida for special appeals, an appeal from an interlocutory order, questioning the sufficiency of service only, is authorized, and from this it is to be implied that an appellant is to derive some benefit from the appeal, which he could not do if the taking of the appeal constituted a general appearance on his part. It is not reasonably supposable that it was intended that the taking, as allowed by the statute, of an appeal from such an order as the one in question, should have the effect of depriving the appellant of the sole benefit sought to be obtained, or obtainable, by a resort to the remedy given. *In the absence of authority from the Florida Supreme Court, applying the general rule to the case of* SUCH AN INTERLOCUTORY APPEAL, *common sense requires us to decline to make the application.* (Italics ours). This contention is made by defendant in error, though there was a stipulation in the state court case, that the supersedeas should not constitute a general appearance."

It would be difficult indeed to state in clearer or plainer language than is done by the sentences italicized in the foregoing quotation, the reasons why there is no conflict between the Federal and State Courts.

B. UNDERLYING PRINCIPLES.

There can be no question of respondent's right to have entered the special appearance in the State Court and that such special appearance did not constitute a general appearance:

> *Standley v. Arnow*, 13 Fla. 361;
> *Tidwell v. Witherspoon*, 18 Fla. 282;

Seacoast Lumber Co. v. R. J. and B. F. Camp Lumber Co., 63 Fla. 604;
Harkness v. Hyde 98 U. S. 476, 25 L. Ed. 237;
Davis v. Cleaveland, C. C. & St. L. R. Co., 217 U. S. 157, 54 L. Ed. 708.

Let us next examine what character of participation appears by respondent in these chancery cases after respondent's motions to quash service had been denied. Going a trifle outside the record in this particular case, and inspecting the records in the four companion cases now before this Court, it will be found that there were sixteen of these Chancery cases and that in fourteen of the cases stipulations were entered into, all of which substantially provided:

> "That proceedings in this cause be stayed pending the prosecution of an appeal from the orders of the court overruling the motions of the said defendants to quash service in the case of J. H. Corbett vs. Rome Insurance Company, et al., which said case is now on trial and being prosecuted in this Court;
> "That the ultimate decision of the said appeal in said case of J. H. Corbett vs. Rome Insurance Company shall be decisive of the validity of the service by publication on said defendants in this case, and if the service in the said Corbett case be ultimately held defective, and ordered quashed, then the service in this case, the validity of which involves identically the same legal questions as that in the Corbett case, shall be held defective and shall be quashed; and
> "That *this stipulation of Counsel shall not be considered as constituting a general appearance of the said defendants in this cause;*"

Respondent was one of the defendants referred to in this stipulation.

For some reason petitioner now completely ignores the portion of this stipulation above italicized. This portion of the stipulation is especially noteworthy in view of the second stipulation entered into by petitioner's then counsel, together with a pointed statement in the opinion of the Supreme Court of Florida.

In the remaining two of these sixteen Chancery suits, "special appeals" were taken to the Supreme Court of Florida from the interlocutory orders of the Chancellor denying the motions to quash service. These cases are known as *Rome Insurance Co. et al vs. Corbett*, 66 Fla. 438, and *Rome Insurance Co. et al. vs. Carter*, 66 Fla. 441.

In these appealed cases, were filed the stipulation with reference to respondent's application for supersedeas not constituting a general appearance. (Page 4 of this brief).

This second stipulation, petitioner in its extremity, now also completely ignores. Here again is forcibly exhibited the fact that petitioner's present counsel are strangers to the State Court cases. These counsel did not live with those cases, and, whatever the cause may be, do not display an understanding of them. The counsel who represented petitioner in the State Courts did not attempt to violate any of these stipulations before the Florida Supreme Court. Note the following from that Court:

> "It may well be that this appeal so operates as a general appearance in the circuit court, as to render the question before us a moot one, *but the appellee does not ask us so to*

hold;" (Italics ours) *Rome Ins. Co. v. Corbett*, 66 Fla. 438, 439.

Section 1908, *General Statutes of Florida*, allows an appeal from interlocutory decrees in chancery. This statute reads:

> "From interlocutory decrees. Appeals may be taken and prosecuted from any interlocutory order, decision, judgment or decree of the circuit courts of this state, when sitting as courts of equity; but the conferring of the right shall not be construed so as to deprive either party from deferring and postponing the entry of his appeal until after the entry of the final decree, or end of the cause as prescribed by law; nor shall such postponement of the appeal be decreed, held or taken to be an acquiescence in the propriety of any interlocutory order or decree made in the progress of the cause, or any waiver of any error therein."

Section 1906, *General Statutes of Florida*, provides:

> "Appeals in chancery shall be matters of right."

A ruling that the defendant is properly in court is such an order as may be appealed from. *Agnew v. Adams*, 24 S. C. 86.

Therefore when respondent exercised its "right" to appeal from the interlocutory orders of the Circuit Court over-ruling its motion to quash service, and when every pleading or paper which respondent filed in prosecuting said special appeal was emphatically limited to a special ap-

pearance, we submit that it entered a true special appeal analogous to a special appearance in a lower court, and that such an appeal does not constitute a general appearance. To hold that such an appeal did constitute a general appearance would be to deprive respondent of the "*right*" to appeal expressly given it by Statute.

In the declaration of rights of the *Constitution of Florida*, Section 4 provides:

> "SECTION 4: All courts in this state shall be open, so that every person for any injury done him in his lands, goods, person or reputation shall have remedy, by due course of law, and right and justice shall be administered without sale, denial or delay."

To hold the prosecution of the special appeal to constitute a general appearance would be to place a penalty on the exercise of the *right* to appeal. Such a holding would be a denial of justice.

A judgment of a court upon its own powers ought never to be final, or else a court would be empowered, however limited its jurisdiction, to take upon itself unbounded jurisdiction.

Respondent is entitled to have the law laid down correctly. If the Hamilton County court proceeded erroneously under the service attempted to be had upon respondent in the chancery cases, respondent has the right to be protected from such erroneous orders. The *right* is given by statute, though this statute would, from the standpoint of justice, appear to be merely declaratory of the common law, using common law in its broad sense. For *is not the object of law the protection rather than the over-throw of legal rights?*

The crucial test is this: How could a court of justice come to the conclusion that the orders of the Florida Circuit Court specially appealed from were erroneous, and then declare that the presenting of these erroneous orders to the Supreme Court of Florida for the purpose of having them corrected, completely nullified the effect of the correction? How could a judicial tribunal announce the law to be that these special appellants had been subjected to erroneous orders of the Florida Circuit Court, and in the same breath say that their ascertaining this fact deprived them of any benefit therefrom? If insufficient service had been made upon the special appellants, why should they be punished for attempting to demonstrate that fact? *Why should the special appellants be penalized for insisting on their rights?* We insist that the only answer to these questions which will be in harmony with the declaration in Section IV of the Bill of Rights of the Florida Constitution, that justice shall not be denied, is to hold these chancery appeals to be true special appeals, and that their prosecution did not constitute a general appearance. *To enforce a right should not be to lose it.* This would be contrary to natural justice.

True it is that special appellants filed several papers in the Supreme Court of Florida, as well as in the Circuit Court of Hamilton County. But they did nothing which was unnecessary in order to protect their rights and to enable them to go before the Florida Supreme Court to present the orders of the Circuit Court specially appealed from. Special appellants were not responsible for the fact that so many papers must be filed in order to prosecute an appeal. Because special appellants

have complied with the requirements of the law for prosecuting an appeal could be no ground for declaring that they have entered a general appearance.

The fact that special appellants had notice of these chancery suits cannot of itself affect in any way the question of what constitutes a general appearance. A defendant in making a motion to quash service in the Circuit Court has just as much notice of the suit as had special appellants of these suits in which they prosecuted special appeals. The mere fact that special appellants had notice of the suit and moved to quash service did not bring them into court, provided the pleadings have been limited to a special appearance.

The question is not, did respondent have notice of the chancery suits, but is, had it been legally served with process? If every sheriff in the state of Florida had gone to Georgia and delivered a copy of a subpoena to appear in this suit personally to each officer and director of respondent bank and read the subpoena to each of these officers, this would not constitute legal service. It would, however, be notice.

Furthermore, we can no more construe the purpose and effect of a pleading or other paper filed in a suit by looking only to a portion of it, than we can interpret any other written instrument by picking out only selected portions. Pleadings, like contracts, deeds, wills, statutes, court orders, and judicial opinions, are to be construed by looking at the four corners of the document. It may be, perchance, and not infrequently is, determined that a pleading when so examined is held to be a nullity. But no court can add to or detract from

a pleading any more than it can add to or detract from the terms of any other written instrument.

When we look at every pleading, paper, or even bond filed by special appellants in the Supreme Court of Florida, it becomes apparent that these pleadings and other papers were and could only be one of two things:

(1st) They were either so limited that they could not do other than amount to a special appeal —their definite limitations would absolutely stand in the way of their amounting to a general appearance, or

(2nd) The limitations conspicuously written into these papers were so drastic that the papers were a nullity.

When the Florida Supreme Court accepted the transcripts of record, and rendered its decision based thereon, it decided that the pleadings, etc., were not nullities; but neither the Florida Supreme Court nor any other Court could re-write these pleadings or make them other than what the parties had made them. Therefore the Florida Supreme Court must be held to have accepted these transcripts as filed in and amounting to a special appeal. The Florida Supreme Court certainly did not hold otherwise, for they expressly stated that:

> "These non-residents have sued out *what they term a special appeal.* (Italics ours).
>
> "It may well be that this appeal so operates as a general appearance in the Circuit Court, as to render the question before us a moot one, but the appellee does not ask us to so hold, and it appears that this is but a test case, upon the decision of which many other cases in that court are depending." *Rome Insurance Co. vs. Corbett*, 66 Fla. 438, 439.

Moreover, the then counsel on the other side were convinced of the soundness of our position.

Special appeals of this character are not new, and so far as we have been able to find authorities upon this point, they are uniform in holding that such an appeal does not constitute a general appearance.

Columbia Screw Co. v. Warner Lock Co., 138 Cal. 445, 71 Pac. 498;
Freer v. White, 91 Mich. 74, 51 N. W. 807;
Craighead v. Martin, 25 Minn. 41;
Hurlburt v. Palmer, 39 Neb. 158, 57 N. W. 1019;
Lyons v. Miller, 2 N. D. 1, 48 N. W. 514;
Paxton v. Daniel, 1 Wash. St. 19, 23 Pac. 441;
Dikeman v. Mrotek, 76 Wis. 332, 45 N. W. 118.

"*Non potest adduci Exceptio ejusdem Rei cujus petitur Dissolutio.*" (A matter, the validity of which is at issue in legal proceedings cannot be set up as a bar thereto). *Broom's Legal Maxims*, 8 ed. 133.

C. First Distinction Between State and Federal Rulings—No Voluntary Appeal.

Petitioner refers to the holding of the Florida cases to the effect that:

> "As the appellant has made herself a party to the suit by *voluntarily* (italics ours) appearing and prosecuting her appeal, she must, upon the return of the cause to the Circuit Court, be considered as regularly before the

> court in like manner as if she had been duly served with process," *Standley v. Arnow*, 13 Fla. 361.

We call attention to just what was announced in *Standley vs. Arnow, supra.* The Court states that since appellant made herself a party to the suit by voluntarily appearing, etc., she must be considered as regularly before the court. *The word* VOLUNTARILY *marks one of the distinguishing features between all holdings of the Florida Court, and the present case.* Special appellants showed as far as it was possible to be shown, that they had not voluntarily appeared, either in the lower or the appellate court. They no more voluntarily appeared to prosecute their special appeal than they did when they entered their special appearance in the lower court and moved to quash service. The one cannot constitute a voluntary or general appearance more than the other.

To show how the subsequent Florida cases dealing with the question of an appeal constituting a general appearance are founded on *Standley vs. Arnow*, we quote from these later cases:

In *Tunno & Jessup & Co. v. Robert*, 16 Fla. 738, on page 751 the Court says:

> "The persons composing the firm of M. K. Jessup & Co., having appeared upon this appeal in this court, upon the return of the cause to the Circuit Court must be considered as regularly before this Court in like manner as if duly served with process. 13 Fla. 368; 1 Pike 50, 376, 386, 405; 4 Bibb 84, 167."

In this case the reference to 13 Fla. 368 is to the quotation taken above from *Standley vs. Arnow.*

In *Shrader v. Shrader*, 36 Fla. 502, on page 518 the Court says:

> "Mrs. Shrader, the appellant in Case No. 2 having by her appeal made herself a party to such case, should proceed to plead to the bill of complaint therein. *Standley v. Arnow*, 13 Fla. 361."

In *Wylly v. Sanford Loan & Trust Co.*, 44 Fla. 818, 820, the Court says:

> "The appeal of the defendants operated as an appearance in the cause however, which will enable the Court below now to proceed in the matter. *Standley vs. Arnow*, and *Finlayson v. Lipscomb, supra.*"

The reference to *Finlayson v. Lipscomb* in the last quotation is meant to be to the case of *Tunno & Jessup & Co. v. Robert.* This is shown by looking up the citation given for *Finlayson v. Lipscomb* earlier in the opinion in *Wylly v. Sanford Loan & Trust Co.*

In *Rumeli v. City of Tampa*, 48 Fla. 112, on page 114 the Court says:

> "The appeal of the defendant Rumeli operated as an appearance in the cause, however, which will enable the Court below to proceed in the matter. *Wylly v. Sanford Loan & Trust Co.*, 44 Fla. 818."

This case as seen follows point-blank *Wylly v. Sanford Loan & Trust Co.*, which in turn follows *Standley v. Arnow* and *Tunno & Jessup & Co. v. Robert. Tunno & Jessup & Co. v. Robert* has been seen to refer directly back to *Standley v. Arnow.*

Thus we see that *Standley v. Arnow, supra*, is the case which each subsequent Florida case either cites directly as the authority for its holding, or is the case to which each of these subsequent cases leads back as its basis.

Petitioner contends that the special appearance was a "voluntary" proceeding, though presenting not a single authority in support thereof.

The authorities seem to be unanimous that *such a proceeding is not voluntary.*

In *Craighead v. Martin*, 25 Minn., 41, it is said:

> "It would seem too plain for argument that such an act, which in itself is a denial of all authority in the justice, cannot be regarded as a voluntary appearance, and express recognition of his authority."

In *Freer v. White*, 91 Mich. 74, 51 N. W. 807, the Michigan Court pertinently said:

> "It would be presuming against the fact to assume that there was any intention on the part of the defendant to submit himself to the jurisdiction of the court."

In *Pugh v. Loisel*, 219 Fed. 417, 424, (5th. C. C. A.) is the following:

> "He is not to be held to have voluntarily submitted himself to the jurisdiction of that court by protesting against its exercise of jurisdiction. *Big Vein Coal Co. v. Read*, 229 U. S. 31, 33 Sup. Ct. 694, 57 L. Ed. 1053."

This last court again in *Smith v. Government of Canal Zone*, 249 Fed. 273, 278, said:

> "This appellant's admission of the court's jurisdiction, or consent to the exercise of it, is not to be inferred or implied from a previous explicit denial of its jurisdiction, though such denial was based upon grounds other than the one stated in the motion to set aside the service of process. *A denial of jurisdiction is not to be given effect as an admission of it.* (Italics ours). *Big Vein Coal Co. v. Read*, 229 U. S. 31, 33 Sup. Ct. 694, 57 L. Ed. 1053; *Pugh v. Loisel*, 219 Fed. 417, 135, C. C. A. 221."

In *Harkness v. Hyde*, 98 U. S. 476, 478, 25 L. Ed. 237, this court said:

> "Illegality in a proceeding by which jurisdiction is to be obtained is in no case waived by the appearance of the defendant for the purpose of calling the attention of the court to such irregularity."

This Court further said *In the matter of Indiana Transportation Co.*, 244 U. S. 456, 458, 61 L. Ed. 1253, 155:

> "Persons by becoming suitors do not place themselves for all purposes under the control of the Court."

D. Second Distinction Between State and Federal Rulings—No Adjudication or Contest on Merits.

Special appellants in no way contested the chancery suits on the merits. They appeared specially and for one purpose only. This purpose was to settle the question of service. No other

question had been raised by any of the defendants. There had been no adjudication whatever on the merits.

Jurisdiction is founded upon service, or, as the Federal Supreme Court says, upon "physical power," which is obtained only by due serivce of process. The first question to be settled in any case is that of jurisdiction. Courts will settle questions of jurisdiction, whenever possible, preliminarily to entering upon the cause. This is precisely and solely what the present respondent requested of the court in the chancery cases. After the chancery court assumed to go into the merits of those cases, the present respondent refrained from the slightest participation.

In each of the cases cited by petitioner in which the Florida Supreme Court held an appeal to constitute a general appearance, the appeal was upon an adjudication of the merits of the case, and not merely upon a ruling on the question of service—with the single exception of the case of *Rome Insurance Co. v. Corbett* which is the decision we are here analyzing and which we are emphatic in asserting does not hold what petitioner contends (pages 34 and 35 of this brief).

In Mr. Fleming's brief, page 9, it is stated:

> "In the case of *Rumeli v. Tampa*, 48 Fla. 112, 37 So. 563, it appeared that the appeal was from an interlocutory appeal, the only decree mentioned in the opinion of the Court or the statement of facts being a decree *pro confesso*."

In reply we quote from a letter written by the Clerk of the Florida Supreme Court:

"The record in the case of *Rumeli v. City of Tampa*, 48 Fla. 112, shows that Judge Wall entered a final decree in said cause November 7, 1903, a decree *pro confesso* having been entered therein November 2, 1903. The final decree purported to run against Rumeli as well as against the other defendants named in the bill."

It thus appears that, without a single exception, in every case in which the Florida Court held an appeal to constitute a general appearance, the appeal was taken after entry of final decree.

A second distinction between this Corbett case and all other Florida cases is the lack, in the Corbett appeal, of any adjudication or contest whatsoever on the merits.

Furthermore five of the cases cited by counsel are decisions on writs of error at common law, and are not in point.

These cases are:

Drew Lumber Co. v. Walter, 45 Fla. 252;
Hayman v. Neil, 53 Fla. 127;
Barnick v. Rouse, 53 Fla. 643;
Busard v. Hutson, 65 Fla. 479;
Henry v. Spiller, 67 Fla. 146.

Unlike Florida chancery practice allowing appeals from interlocutory orders (page 22 of this brief), common law writs of error are allowed in Florida only after final judgment.

Section 1691 of the General Statutes of Florida reads:

"*Writs of error—only from final judgments:* Writs of error shall lie only from

final judgments except as specified in Section 1695."

Section 1695 of the Florida General Statutes, referred to in the section just quoted, allows writ of error to the party aggrieved by the granting of a motion for new trial, without waiting for final judgment. Even so a writ of error follows a contest on the merits.

That an appeal solely upon questions of service or jurisdiction over a defendant is not a general appearance, see cases collated on page 27 of this brief.

E. Real Holding of Florida Court.

The Florida Supreme Court did not hold the so called constructive service to be a valid service, nor the special appeal to be a general appearance. What it did hold was that this so called service was a mere notice, which may be paid attention to or not, as the defendant may choose. Said the Florida Court:

> "The purpose of the statute authorizing constructive service by publication is to notify non-residents of the pending suit so that they may if they care to do so, come into the case, and if the statute be followed, there is no right in the non-resident to quash this *notice;* he has his right if not waived, to object should the court thereafter commit an error against him," (italics ours) *Rome Ins. Co., et al. vs. Corbett,* 66 Fla. 438, 440.

Therefore, the most that can be said is that the respondent received a notice that sixteen chan-

cery suits had been brought against him, which notice was lawfully given. This notice did not give the chancellor "physical power" *in personam* over respondent.

The giving of this notice is not "confined in its operation to the cases where the court might make final decree or judgment . . . . It was not intended that the question of the power to enter the ultimate decree or judgment should enter into the question of the right to give notice of the suit to a non-resident . . . . . We are not to assume upon the face of the bill that the Circuit Court will enter an unauthorized decree." Quoted from *Rome Ins. Co. vs. Corbett*, 66 Fla. 438.

But the Circuit Court of Hamilton County did proceed to enter an unauthorized decree—a decree beyond its power to enter—a decree falling within that class of cases in which a mere notice of suit to a non-resident does not permit of the making of a final decree or judgment. Such a decree is just as much a nullity, as was the judgment held void in *Pennoyer v. Neff*, 96 U. S. 714, 24 L. Ed. 565.

III.

THIS CASE DOES NOT WARRANT GRANTING A WRIT OF CERTIORARI

A. No Conflict Between Federal and State Courts.

It is submitted that we have just shown the non-existence of the asserted conflict "between the Supreme Court of the State of Florida and the

United States Circuit Court of Appeals in and for the Fifth Circuit" (first ground of petition), which is the principal and really the sole ground upon which petitioner relies in seeking a writ of certiorari.

B. FEDERAL COURT ENTITLED TO EXERCISE ITS OWN INDEPENDENT JUDGMENT.

Had there existed such conflict as petitioner contends, the Federal Court should exercise its own independent judgment upon the validity and effect of service of process attempted by the Florida State Court upon this respondent foreign corporation bank. The courts of the United States will not leave a foreign corporation to the mercy of the decisions of state courts respecting the validity and effect of a purported service, either actual or constructive:

Goldey v. Morning News, 156 U. S. 518, 39 L. Ed. 517;
Barrow Steamship Co. v. Kane, 170 U. S. 100, 111, 42 L. Ed. 964, 968;
Conley v. Mathieson Alkali Works, 190 U. S. 406, 47 L. Ed. 113;
Mechanical Appliance Co. v. Castleman, 215 U. S. 437; 54 L. Ed. 272;
Riverside & D. R. Cotton Mills v. Menefee, 237 U. S. 189, 59 L. Ed. 910;
Meisukas v. Greenough Red Ash Coal Co., 244 U. S. 54, 61 L. Ed. 987.

We would also refer to the recent pertinent statement of Mr. Justice McKenna in *Chipman v. Thomas B. Jeffrey Company*, decided January 19, 1920:

"In resting the case on New York decisions we do not wish to be understood that the validity of such service as here involved would not be of Federal cognizance, whatever the decision of a state court, and refer to *Pennoyer v. Neff*, 95 U. S. 714, 24 L. Ed. 565; *St. Louis Southwestern R. Co. v. Alexander, supra; Philadelphia & R. R. Co. v. McKibbin*, 243 U. S. 264, 61 L. Ed. 710, 37 Sup. Ct. Rep. 280; *Meisukas v. Greenough Red Ash Coal Co.* 244 U. S. 54, 61 L. Ed. 987, 37 Sup. Ct. Rep. 593; *People's Tobacco Co. v. American Tobacco Co.* 246 U. S. 79, 62 L. Ed. 587, 38 Sup. Ct. Rep. 223, Ann. Cas. 1918 C, 537."

Furthermore, the rights of holders of commercial paper are here involved, and in such cases the courts of the United States exercise their own independent judgment:

Pana v. Bowler, 107 U. S. 529; 27 L. Ed. 424;

Presidio County v. Noel-Young Bond & Stock Co., 212 U. S. 58, 73; 53 L. Ed. 402, 408;

Rollings v. Lake County, 34 Fed. 845, per Brewer, J;

Bank of Edgefield v. Farmers Cooperative Mfg. Co., 52 Fed. 98, (5th. C. C. A.)

Town of Newberne v. National Bank of Barnesville, Ohio, 234 Fed. 209, (6th. C. C. A.)

The property right of the holder of a negotiable instrument is different from the right of the owner of real property or other personal chattels, as pointed out in *Town of Enfield v. Jordan*, 119 U. S. 680, 693, 30 L. Ed. 523, 529:

> "Rights to real property and personal chattels within the jurisdiction of the court, and subject to its power, may be affected by *lis pendens*, but not those acquired by the transfer of negotiable securities or by the sale of articles in market overt in the usual course of trade."

Said Mr. Justice Story in *Swift v. Tyson*, 16 Peters 1, 19, 10 L. Ed. 865, 871:

> "The law respecting negotiable instruments may be truly declared in the language of Cicero, adopted by Lord Mansfield in *Luke v. Lyde*, 2 Burr. R. 883, 887, to be in a great measure, not the law of a single country only, but of the commercial world. *Non erit alia lex Romae, alia Athenis, alia nunc, alia posthac, sed et apud omnes gentes, et omni tempore, una eademque lex obtinebit.*"

The state court cases are a patent attempt to keep from this respondent foreign corporation bank its right to submit to a court of the United States the merits of its claim on the certificates of deposit. Well may we recall what this Court said in *Gordon v. Longest*, 41 U. S. 97, 104, 10 L. Ed. 900, 903:

> "One great object in the establishment of the courts of the United States and regulating their jurisdiction was to have a tribunal in each state, presumed to be free from local influence, and to which all who were non-residents or aliens might resort for legal redress.'

C. This Purely Private Controversy Would Not Justify A Writ of Certiorari Before Final Judgment.

Said this Court in *Forsyth v. Hammond*, 166 U. S. 506, 514, 41 L. Ed. 1095, 1098:

> "We have declined to issue writs of certiorari in cases where, there being only a matter of private interest, there had been no final judgment in the court of appeals. *Chicago & N. W. R. Co. v. Osborne*, 146 U. S. 354."

Neither the interest of the nation nor of any state is here involved. The decision of the United States Circuit Court of Appeals is by a unanimous court. Petitioner did not apply for a rehearing in the Court of Appeals. The asserted conflict between the state and federal courts is indicated by petitioner only in the vaguest and most shadowy manner, and, as herein shown, is without merit.

It is submitted that the petition for writ of certiorari should be denied.

Respectfully submitted, Henry C. Clark

HENRY C. CLARK,
Attorney and Counsel for Respondent.

W. E. KAY, W. E. Kay
J. L. DOGGETT, J. L. Doggett.
Of Counsel.

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FILE NO. 27,729

IN THE

Supreme Court of the United States

October Term, 1921

No. 77

THE BANK OF JASPER,
A CORPORATION,
Petitioner,

vs.

THE STATE BANK OF ROME,
A CORPORATION,
Respondent.

BRIEF FOR RESPONDENT

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J. L. DOGGETT,
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IN THE

Supreme Court of the United States

THE BANK OF JASPER,
A CORPORATION
Petitioner

VERSUS

THE STATE BANK OF ROME, GEORGIA,
A CORPORATION
Respondent

October Term, 1921

No. 77

BRIEF FOR RESPONDENT

STATEMENT

In this action, instituted January 27th, 1913, (R. 2), respondent bank, a foreign corporation citizen of Georgia, seeks to recover from petitioner bank, a citizen of Florida, upon the several certificates of deposit described in and attached to the several counts of respondent's declaration (R. 5.) The obligation represented by these certificates of deposit had matured in November 1912, two months preceding the institution of this suit.

There is but one plea to each count at present standing in the record. (R.60.) This plea sets up a

purported decree of the State Circuit Court of Hamilton County, Florida, in Chancery, which decree attempts to cut off respondent's rights in and to the certificates of deposit sued on in the respective counts (R. 7.) Respondent demurred to this plea contending that it was bad because the decree therein set forth was based on mere constructive service of process and yet the decree sought to operate *in personam*, (R. 17.) The District Court over-ruled this demurrer, (R. 19.) In so doing the District Court rendered an opinion in the case of *First National Bank of Jasper, Florida vs. The First National Bank of Rome, Georgia*, (No. 74) which is found at page 30 *et seq.* of the transcript of record in that case.

Respondent filed one replication to the petitioner's plea to each count (R. 21). This replication sets forth in detail every step of said chancery suit in the Florida State Courts in so far as respondent in any way participated therein, and shows the total invalidity of said decree attempting to cut off respondent's rights. Petitioner demurred to this replication which demurrer was sustained (R. 60.) The District Court in sustaining this demurrer announced that "the questions attempted to be raised by these replications are questions passed upon by this Court in its ruling upon the demurrer to the pleas. I adhere to the ruling then made." (R. 60.)

There was and could have been no showing in said chancery suit that respondent foreign corporation bank was doing business in Florida, or had any representative in Florida upon whom service was or could have been made. The only semblance or service of process was by publication.

The State Court Chancery Suit was insti-

tuted January 3rd, 1913, (R. 26.), after the obligation represented by the certificates of deposit had matured, and only a short while before the present suit was begun. The State Court cases are a patent attempt to keep from this respondent foreign corporation bank its right to submit to a court of the United States the merits of its claim on the certificates of deposit. Well may we recall what this Court said in *Gordon v. Longest*, 41 U. S. 97, 104, 10 L. Ed. 900, 903:

> "One great object in the establishment of the courts of the United States and regulating their jurisdiction was to have a tribunal in each state, presumed to be free from local influence, and to which all who were non-residents or aliens might resort for legal redress."

Looking at the proceeding in said chancery suit as set forth in said plea and replication, it is seen that both the original and amended Bills of Complaint therein, by their very allegations, preclude any contention that said equity suit was *in rem*, for in both of said Bills it was distinctly alleged that the said certificate of deposit was void, and the Bills prayed for a decree declaring the certificate of deposit to be void, (R. 30, 39); that every pleading or other paper of any kind filed by the respondent in said chancery suit was limited and recites that the respondent was "not appearing generally but appearing specially, solely and only and limiting this appearance to what in contemplation of law amounts only and solely to a special appearance;" that respondent filed two motions to quash the attempted service upon it, the second motion being filed after an amendment to the

bill of complaint; that each of these motions was denied; that, thereupon, "special appeals" were sued out in two chancery cases, and stipulations filed in fourteen other chancery cases that the decision of the Florida Supreme Court in the two cases should be decisive of the validity of the service in the fourteen cases, *but that the stipulations shall not be considered as constituting a general appearance;* (that there were sixteen chancery cases in all will appear by an examination of the four transcripts as filed in the Circuit Court of Appeals and now before this Court in the instant and its three companion cases;) a second stipulation was entered into in the chancery cases which further emphasizes that these special appeals did not constitute a general appearance, this second stipulation being appended to the notice of application for supersedeas and reading "*We agree that this notice shall in no sense operate as a general appearance in the above case*" and is signed by the then counsel for complainant (R. 451); that after the ruling of the Supreme Court of Florida, no further participation was taken by respondent in said chancery cases; that nevertheless the Florida Circuit Court proceeded to enter a final chancery decree purporting to take away valuable rights of the respondent.

It should also be noted that the pleas setting up the State Court decrees are entitled "Addtional pleas" : that these "additional pleas" were not interposed until August, 1914 (R. 7), more than a year and a half after this suit had been instituted: and that the State Court decrees were not entered until July, 1914 (R. 13 et seq)., approximately eighteen months after the institution of this suit.

The United States Circuit Court of Appeals held: (1st) there was no *res to* confer jurisdiction upon the state court; (2nd) no general appearance was made by respondent in the state court; and (3rd) the state court decree not being a personal decree could not be a defense to this suit. (R. 71.) The United States Circuit Court of Appeals reversed the District Court (R. 77.)

Petitioner asserts a conflict between this decision and the decision of the Florida Supreme Court in *Rome Insurance Company, et al. v. J. H. Corbett*, 66 Fla. 438.

Respondent (1) denies that such conflict exists and (2) contends that even if the asserted conflict were a fact, it would be of such nature that the Federal Court would exercise its own independent judgment.

We shall (1st) determine the nature of the State Court suits, (2nd) analyze the asserted conflict between the Federal and State Court, and (3rd) ascertain the power of the Federal Court to adjudicate the questions presented.

ARGUMENT

I.

THE STATE COURT SUITS WERE NOT IN REM.

A. No Res Existed, Under Allegations of Bill.

If anything stands out conspiciously in the state Court cases it is the denial of any indebtedness owing to respondent. This denial appears in the original bill, the amended bill, and in the decree of the State Court. Yet notwithstanding these denials this same indebtedness is now claimed to have constituted a *res* in the State Court.

The theory of the chancery suits cannot now be changed; the indebtedness then denied cannot now be affirmed; the *res* which did not then exist cannot now be created. Petitioner is estopped from asserting anything but that the *res* was non-existent.

Petitioner's counsel refer to many cases of attachment and of garnishment. In such cases, the indebtedness attached or garnished is not denied by the application for the attachment or garnishment. If the indebtedness sought to be attached or garnished should be denied in the very affidavit in which it is applied for, can it be supposed for a moment that a writ would issue, or if issued, would stand?

There must be a "real, not an imaginary" *res* to furnish the base for a proceeding *in rem*.

Chase v. Wetzlar, 225 U. S. 79, 89, 56, L. Ed. 990, 995.

The counsel now representing petitioner were not counsel in the State Court cases, nor during the earlier stages of the present suit. When these counsel came into this case, respondent had long been vigorously and affirmatively asserting the validity of its certificates of deposit, and its right to collect thereon. As a consequence, the present counsel for petitioner have not been able to look at the State Court cases through the eyes of one who prepared them, fought through them and claimed from the start that respondent's certificates of deposits were void. *PEITIONER'S PRESENT COUNSEL* claim the certificates of deposit are void by virtue of the State Court decree. *THEIR CLIENTS* claimed these certificates of deposit were void from the moment the first bill was filed in the State Court. This original claim removes and destroys even the possibility of there being a *res* in the State Court.

Petitioner cannot blow hot and cold. *Allegans contraria non est audiendus.* It cannot both affirm and deny. It cannot deny an indebtedness or *res* in the State Court, and under the same facts, avow an indebtedness or *res* in the Federal Court. We have here an estoppel by record. Petitioner made his bed in the State Court and must lie on it. Changing counsel will not enable petitioner to transform a denial into an affirmance.

Gill v. More (Ala.) 76, So. 453 holds:

> "Where an action is based upon a denial of any *res* in defendant, if the decree sought be a decree operating *in personam* only, to be made under the ordinary jurisdiction of equity, as though de-

> fendant make or cancel a conveyance, it can only be made after personal service within the jurisdiction or after appearance."

In *Davis v. Wakelee* 156 U. S. 680, 39 L. Ed. 578, this Court said:

> "When a party assumes a certain position in a legal proceeding and succeeds in maintaining that position, he may not thereafter, simply because his interests have changed, assume a contrary position.

To this point see also:

Brooklyn City & Newtown Railroad Company v. National Bank of the Republic, 102 U. S. 14, 26 L. Ed. 61,

Daniels v. Tearney 102 U. S. 415, 26 L. Ed. 187,

Pease v. Rathbun-Jones Engineering Company, 243 U. S. 273, 61 L. Ed. 715,

Norfolk Southern Railway Company v. Chatman 244 U. S. 276, 61 L.Ed. 1131.

Counsel have failed to show any sort of seizure, attachment, sequestration or impounding by the State Court. There was none. The chancery bills informed the State Court, that no indebtedness existed. Absolutely no other showing was ever made to the State Court. To stretch out the hand to seize a non-existant leaves the hand empty. But the State Court did not even reach out its strong arm." Obviously not. Such would have been futile.

In *Loiza v. Superior Court of San Francisco*, 85 Cal. 11, 20 Am. St. Rep. 197, 9 L. R. A. 376, the case principally relied upon by petitioner in the State

Court and in the United States District Court as a precedent for the State Court suits, and the case referred to in the opinion of the District Court (R.30 of case No. 74), a receiver was appointed who actually took possession of certain property. No receiver was prayed for in the instant case, and for good reason. What funds could a receiver have identified and taken charge of as representing this denied indebtedness? Certainly it is not to be assumed that the petitioner bank had segregated a specific lot of funds with which to meet payment of the obligation to respondent due "in current funds." And had petitioner done this, it could not thereby affect respondent's rights under its certificates of deposit.

The real and only purpose of the State Court suits as against this respondent was to cancel and decree to be void the certificates of deposit herein sued upon (see third ground of petition for certiorari.) In the absence of any showing to the contrary, it will be presumed that these certificates of deposit were in the possession of respondent in its banking house in Georgia. Yet when this foreign corporation bank comes into the United States Court to collect upon these certificates, it is met by a State Court decree purporting to adjudicate that it holds merely a void scrap of paper.

In *Stockbridge v. Phoenix Mutual Life Insurance Co.*, 193 Fed. 558, 559-560 (Dist. Ct., D. Conn.), the court had before it a bill as novel as the bills filed in the Florida Court, and regarding this bill the Federal Court pertinently said:

> "The petitioner has presented a very clever bill————. The court ————is bound

to dissect and analyze, so that it may learn what is the real nature of the bill."

"The absent defendant has, in law, a claim against the insurance company as the beneficiary under the two policies. The policies are merely statements on paper of what the contract was. The conditions precedent in the contract have been fulfilled, and payment of the contract is due. Is the claim a tangible, fixed, definite, and certain thing, with its situs here? It strikes me that Mrs. Ringwalt can assert and enforce her claim against the insurance company without coming into this district. It is a claim, which from its inherent nature, is transitory, attaches to her person, and can be taken with her wherever she goes. It is like the contents of a handbag, in which she might carry the usual accessories on a journey. She is no more constrained to come to Hartford to make the use of her claim than she would be to use the contents of the handbag. It is a thing subject to constant shifting, changing, and uncertainty. That the policies may have been within the district when the suit was brought was immaterial. She could press her claim in another forum in spite of their presence here. The papers upon which the contracts of insurance are written are not the essence of the contention which this suit presents."

The State Court suits are an anomaly. They are a patent attempt by local citizens to rush into a local State Court and attempt to destroy past due negotiable instruments held by citizens of another State. The only case even slightly in point which counsel have been able to cite in support of their right to do this is *Loiza v. Superior Court of San Francisco supra*, but in that case, the notes, mortgages and gold

coin in suit were within the jurisdiction of the California Court and taken into custody by a receiver, under direction of a Court order. Here the certificates of deposit were in Georgia and the indebtedness represented thereby asserted in the bills of complaint to be void. No Court has ever held that such a suit was *in rem*.

B. Equity Acts in Personam.

The fact that respondent claims the right to collect its certificates of deposit out of "current funds" of petitioner did not authorize a decree against respondent upon mere constructive service, assuming for the moment that "current funds" could constitute a *res*. While only the certificates of deposit issued by the First National Bank of Jasper used the language "payable in current funds," yet necessarily this is all that the certificates issued by the Bank of Jasper could call for. No special fund was created, and certainly neither bank intended to or did set aside and keep idle a specific fund as represented by these certificates of deposit.

These State Court cases were in a Court of Equity.

Equity is a Court of conscience. Its attention is directed primarily to the duty of the defendant, and it vindicates the right of the plaintiff through compelling the defendant to fulfill his co-relative duty, ordering him to do the very act he is under obligation to do, or to refrain from the very act he is under obligation not to do. Hence the maxim "Equity acts *in personam*."

While this power to act *in personam* upon the defendant in many ways enlarges the ability of

the Chancellor to effect redress for the plaintiff, it also constitutes a specific limitation in other ways upon the jurisdiction of the Chancellor.

At no time throughout this litigation, has it been contended by the other side that any statute of Florida authorizes a chancellor to proceed *in rem* as against personal property. Furthermore in Florida, the Courts have not developed by a species of judicial legislation, any sort of spurious doctrine that will authorize a Chancellor to act and adjudicate *in rem* except where such authority is given him by statute.

Therefore, with neither a Florida statute nor a Florida decision authorizing a Chancellor to act *in rem* in this case, it is not to be expected that this United States Supreme Court will undertake judicially to legislate regarding the powers of a Court of Equity in Florida.

The State Court suits are as closely analogous to a bill to remove a cloud on title as to any known form of procedure. It is settled that such a suit, in the absence of a statute, is *in personam*, and a non-resident defendant served merely constructively is not bound by a decree therein entered; *Hart v. Sansom*, 110 U. S. 151, 28 L. Ed. 101.

In that case this Court said:

> "Generally, if not universally, equity jurisdiction is exercised *in personam*, and not *in rem*, and depends upon the control of the court over the parties, by reason of their presence or residence and not upon the place where the land lies in regard to which relief is sought. Upon a bill for the removal of a cloud upon title, as upon a bill for the specific performance of an agreement

to convey, the decree, *unless otherwise expressively provided by statute*, (Italics ours,) is clearly not a judgment *in rem*, establishing a title in land, but operates *in personam* only, by restraining the defendant from asserting his claim, and directing him to deliver up his deed to be cancelled, or to execute a release to the plaintiff. *Langdell Eq. Pl.* (2nd Md.) Sec. 43, 184; *Massie vs. Watts*, 6 Cranch. 148; *Orton vs. Smith*, 18, How. 263, *Vandever vs. Freeman*, 20 Tex. 334.

It would doubtless be within the power of the State in which the land lies to provide *by statute* (Italics ours) that if the defendant is not found within the jurisdiction or refuses to make or cancel a deed, this should be done in his behalf by a Trustee appointed by the court for that purpose. *Felch vs. Hooper*, 119, Mass. 52; *Ager vs. Murray*, 105 U. S. 126, 132. But in such a case, as in the ordinary exercise of its jurisdiction a court of equity acts *in personam*, by compelling a deed to be executed or cancelled by or in behalf of the party. It has no inherent power, by the mere force of its decree, to annul a deed, or to establish a title."

Hart vs. Sansom, supra, involves constitutional rights. Respondent relies upon the rights recognized and announced in that case. These rights have never been altered or limited and to them the doctrine of *stare decisis* is applicable.

We would also refer to the valuable discussion of the nature of equity decrees found in *Langdell's Equity Pleading*, 2nd Ed., Sections 42 and 43, also note appended to Section 42, and found on pages 35 to 38, also Section 184. These citations are specifi-

cally approved in *Hart vs. Sonsam, supra.* See also the clear discussion in 10 R. C. L. 364 and 387.

In *Boswell's Lessee v. Otis, et. al.,* 9 How. 336, on page 350, 13 L. Ed. 164, 170, this Court said:

> "No principle is more vital to the administration of justice, than that no man shall be condemned in his person or property without notice, and an opportunity to make his defence. And every departure from this fundamental rule, by a proceeding *in rem*, in which a publication of the notice is substituted for a service on the party, should be subjected to a strict legal scrutiny. *Jurisdiction cannot be assumed and exercised in such cases upon the general ground, that the subject matter of the suit is within the power of the court.*" (Italics ours.)

The leading case of *Baldin vs. Hale*, 1 Wall. 223, 234, 17 L. Ed. 531, holds, as stated in the opinion, page 534:

> "Insolvent laws of one state cannot discharge the contracts of citizens of other states, because they have no extra-territorial operation, and consequently the tribunal sitting under them, unless in cases where a citizen of such other state becomes a party to the proceeding, has no jurisdiction in the case. *Legal notice cannot be given* and, consequently, there can be no obligation to appear, and of course there can be no legal defaults." (Italics ours.)

An action for specific performance cannot, in the absence of a statute, be maintained by the courts of the State in which the property is located, against a non-resident served only constructively.

Hollingsworth v. Barbaur, 4 Peters 466; 7 L. Ed. 922;

Texas Company v. Central Fuel Oil Co., 194 Fed. 1 (CCA 8th Cir.)

Snell v. Hill, 263 Ill. 211, 105 N. E. 16;

Homer v. Ellis, 75 Kan. 675; 90 Pac. 275; 121 Am. St. Rep. 446;

Spurr v. Scovill, 3 Cush. 578;

Silver Camp Mining Co. vs. Dickert, 31 Montana 488; 78 Pac. 967; 67 L. R. A. 940; 3 Ann Cas. 1000.

An injunction operates only *in personam, Hitchman Coal & Coke Co. v. Mitchell*, 245 U. S. 229; 62 L. Ed. 160.

The nature of an interpleader suit is particularly noteworthy in determining the validity of the decrees of the Florida State Court. In an interpleader suit, the complainant places an actual specific fund in the very lap of the Court, and prays its adjudication as between the interpleaded defendants. Here might seem to be a *res*. But it is uniformly recognized that a non-resident defendant served only by publication is not bound by a decree which undertakes to cut off his rights:

New York Life Ins. Co. v. Dunlevy, 241 U. S. 518, 521; 60 L. Ed. 1140, 1142;

Bell v. Gunn, 94 Ga. 642; 21 S. E. 899;

Gary v. Northeastern Masonic Aid Assn. (Iowa), 50 N. W. 27;

Tremblay v. Aetna Life Ins. Co., 97 Me. 547; 55 Atl. 509; 94 Amer. St. Rep. 521;

Expressmen's Mutual Benefit Assn. v. Hurlock, 91 Md. 585; 46 Atl. 957; 80 Amer. St. Rep. 470;

Scharmann v. Union Pac. Ry. (Minn.) 175 N. W. 554;

Ward v. Bankers Life Co. 99 Neb. 812; 157 N. W. 1017;

Cross v. Armstrong, 44 Ohio State 613; 10 N. E. 160;

Washington Life Ins. Co. v. Gooding, 19 Tex. Civ. App. 490; 49 S. W. 123.

Cross v. Armstrong, supra, is an especially strong and well-reasoned case and because of its importance we quote therefore somewhat at length:

> "It is urged when the company asked that an interpleader be awarded, and brought the money owing by it into court, the court then obtained jurisdiction of the fund, and, from that time forward, the proceeding was one essentially *in rem*, and the court, having then obtained jurisdiction of the *res*, and having given notice according to the laws of Pennsylvania, had ample power to hear and determine, and having so heard and determined, the parties are bound by the judgment. That such proceeding could be *in rem* seems a novel doctrine. '*In Rem*' is understood to be a technical term, taken from the Roman law, and there used to distinguish an action against the thing from one against the person, the terms *in rem* and in *personam* always being opposite one of the other; an act *in personam* being one done or directed against a specific person, while an act *in rem* was one done with reference to no specific person but against or with reference to, a specific thing, and so against whom it might concern, or 'all the world.' A proceeding brought to determine the *status* of the thing itself,—the *particular thing*,—and which is confined to the subject matter *in specie*, is *in rem*, the judgment being

intended to determine the state or condition, and, *pro facto*, to render the thing what the judgment declares it to be, while a proceeding which seeks the recovery of a personal judgment is *in personam*. In the former, process may be served on the thing itself, and by such service, and making proclamation, the court is authorized to decide upon it without other notice to persons, all the world being parties, while, in the latter, in order to give the court power to adjudge, there must be a service upon those whose rights are sought to be affected. As regards rights, the terms signify an antithesis of 'available against a particular person', and 'available against the world at large.' Thus, '*jura in personam*' are rights primarily available 'against specific persons; *jura in rem*, rights only available against the world at large.' Beyond this, a judgment of decree *in rem*, or in the nature of a judgment *in rem*, while it binds third persons, such as the sentence of a court of admiralty on a question of price; or a decree of other courts upon the personal *status* or relation of the party such as dissolution of marriage contract, bastardy, etc.; a decree in probate court admitting a will to probate and record, granting administrators, etc.; or a decree of a court of a foreign country as to the *status* of a person domiciled there. We quote from *Freem. Judgm.* the definition of 'judgment *in rem*' given by that author: 'An adjudication against some person or thing, or upon the *status* of some subject-matter, which, whenever and wherever binding upon any person, is equally binding upon *all* persons.' In contract, a judgment *in personam* is, 'in form as well as substance, between the parties claiming the right; and that it is so *inter partes* appears by the records itself.' *Woodruff v. Taylor*, 20 Vt. 65.

From all which it appears that a judgment *in rem*, at least when against anything, may bind the *res* in the absence of any personal notice to the parties interested; but a judgment *in personam*, as we have seen, can have no validity except upon service on the interested parties, or what is equivalent to it. Why was the Philadelphia action, in its nature, not a proceeding between parties claiming right to money due under the policy, rather than a proceeding to determine the *status* of such money. *If it was the former, then the efficiency of the judgment depended upon having the parties before the court so that these conflicting claims could be adjudicated;* (Italics ours); if the latter, then it would appear to be one wherein the court's judgment would have been effectual and conclusive without reference to whether the parties were before the court or not; and the rights of both of them could have been as well settled by the filing of a bill by the insurance company, and the bringing of the money into court, and without the presence, by service or appearance, of either of the parties claiming to be interested in the fund. It was not the *status* of any *particular money* that was to be determined; for any money which was a legal tender could have effectually satisfied the claim of the party receiving it; nor was there any claim primarily, by even the widow, much less the administrator, to any money *in specie;* nor did either company or the widow, at any time, claim or admit that the administrator had any money or property within the jurisdiction of the court, or valid claim to any subject-matter sought to be affected by the decree to be rendered. The proceeding was clearly one of interpleader, and that only. *We do not understand that an action in personam, simply because a debtor brings money, the right to recover*

which is in contention, and gives to the custody of the court a sum sufficient to discharge his debt, changes into an action in rem, or that an interpleader suit is, in its nature, a proceeding in rem. (Italics ours.) In the Philadelphia case the company obtained a complete standing in court, if, with other proper averments, the pleader had alleged a willingness to bring the money into court. Manifestly, the action thus began would not have been *in rem.* Then, does the mere fact that the company, (the debtor), being sued, voluntarily delivers money to the clerk of the court, rather than keep it in its own safe, or to its credit in bank, or loaned upon call, change the action from one *in personam* to one *in rem?* We think not."

Cross v. Armstrong, supra, has been twice approved by this Court.

In *Leigh v. Green,* 193 U. S. 79, 48 L. Ed. 623, 628, this Court said:

> "When the proceedings are *in personam* the object is to bind the rights of persons, and in such cases the person must be served with process; in proceedings to reach the thing, service upon it and such proclamation by publication as gives opportunity to those interested to be heard upon application is sufficient to enable the court to render judgment. *Cross v. Armstrong,* 44 Ohio St. 613, 624, 10 N. E. 160."

Again, a still more important acception by this Court of the principles announced by the Ohio Court is found in *New York Life Insurance Co. v. Dunlevy,* 241 U. S. 518, 60 L. Ed. 1140, 1142, as follows:

> "The interpleader initiated by the company was an altogether different matter. *This was*

an attempt to bring about a final and conclusive adjudication of her personal rights. (Italics ours), not merely to discover property and apply it to debts. And unless in contemplation of law she was before the court, and required to respond to that issue, its orders and judgments in respect thereto were not binding on her. *Pennoyer v. Neff*, 95 U. S. 714, 24 L. Ed. 565; *Shinn, Attachment & Garnishment*, Sec. 674. See *Cross v. Armstrong*, 44 Ohio St. 613, 623, 625, 10 N. E. 160."

A situation quite similar to the present case was passed upon in *Aetna Life Insurance Co. v. Lyon County*, 95 Fed. 325, at page 331, where it is said:

"Much reliance is placed by the defendant upon a decree rendered in a case entitled *Anderson v. Insurance Co.* (Iowa) 55 N. W. 348, by the district of O'Brien County, Iowa, and affirmed on appeal by the state supreme court, which was a proceeding in equity brought by certain residents and taxpayers of O'brien county to restrain the county treasurer from making any payments on the bonds negotiated by B. L. Richards, and to have the bonds adjudged to be illegal and non-enforcable, and in which case a decree to that effect was entered. It is shown upon the record that in that case service of the original notice therein was not had upon any one of the complainants within the state of Iowa, they being all residents of other states, and no appearance therein was entered for any of the complainants except the Orient Fire Insurance Company, and therefore the decree therein is of no force against any of the complainants, except the Orient Company; it being well settled that, in personal actions, the service of notice by publication, or by

> reading the process to the party, at a place outside of the territorial jurisdiction of the court, confers no jurisdiction over the party thus served. *Pennoyer v. Neff*, 95 U. S. 714; *Hart v. Sonsom*, 110 U. S. 151, 3 Sup. Ct. 586. The adjudication in that case had no effect upon the rights of any of the complainants herein, except the Orient Company."

In *Brooklyn v. Aetna Life Insurance Co.*, 99 U. S. 362, 25 L. Ed. 416, Justice Harlan speaking for the Court said:

> "The suit commenced and determined in the Circuit Court of Lee County was a proceeding wholly *in personam*, against the holders and owners of bonds and coupons which had been issued in the name of the Town, and delivered to the Railroad Company. Upon principle and authority, no decree therein rendered could bind anyone not personally served with process, or who did not appear. It could not affect the rights of non-resident holders of bonds and coupons, proceeded against by constructive service. Such service, as to them, was ineffective for any purpose whatever. *Pennoyer v. Neff*, 95 U. S. 714, and authorities there cited."

To the same effect see:

Township of Empire v. Darlington, 101 U. S. 87, 25 L. Ed. 878.

Pana v. Bowler, 107 U. S. 529, 27 L. Ed. 424.

In two decisions, this Court has pointedly stated that "the foundation of jurisdiction is physical power:"

McDonald v. Mabee, 243 U. S. 90, 91, 61 L. Ed. 608, 609.

In the matter of Indiana Transportation Co., 244 U. S. 456, 457, 61 L. Ed. 1253, 1255.

Hence it follows that where the jurisdiction is *in personam*, such jurisdiction cannot exist unless founded on power over the person.

We submit that the Hamilton County Circuit Court was wholly lacking in power to enter a decree adjudicating respondent's rights under the certificates of deposit herein sued upon.

II

NO CONFLICT BETWEEN FEDERAL AND STATE COURTS

A. Question Stated.

The question of procedure upon which petitioner asserts a conflict between the Federal and State Courts was admirably stated and determined in the opinion of the Circuit Court of Appeals as follows:

> "It is contended by defendant in error that the effect of appealing from an interlocutory order by the plaintiff in error (defendant in the Corbett case) was a general appearance on its part in that case, and conferred jurisdiction over its person on the circuit court on the remand of the case. The rule in Florida, differing from that which obtains in the federal courts, is to the effect that an appellant, though objecting to the sufficiency of service successfully, is considered in court upon the return of the case to the lower court. Conceding that this court will follow the rule of decision in the state court, in passing upon a judgment in that court, we think the Florida rule did not apply in the Corbett case. The question of its applicability was suggested, but not decided by the Supreme Court of Florida in its opinion in that case, because the appellee asked that the appeal be decided on another ground. The Supreme Court held that—
>
> 'If the statute be followed, there is no right in the non-resident to quash this notice (by publication;) he has his right if not waived, to

object should the court thereafter commit an error against him.'

"The order of the circuit court was for that reason affirmed, apparently leaving the sufficiency and effect of the substituted service to be determined by the character of relief awarded against the non-residents upon final decree. The appeal was from an interloctury order of the circuit court, which affected only the question of service. *It was not an appeal from a final decree, upon which the insufficiency of service was assigned, with other error, as in the cases cited supporting the Florida rule.* (Italics ours). The Florida statute allowing appeals from interlocutory orders was held by its Supreme Court in the Corbett Case to cover an order affecting service only. No other question than the rightful presence of the non-residents in the circuit court by virtue of the substituted service was presented by the appeal.

"If the rule contended for applies to such an interloctury appeal, then the Florida Legislature and its Supreme Court did a futile thing in providing a method of appealing from an order of the circuit court sustaining service, where the taking of the appeal itself by the party complaining of service alone puts the party in court as effectually as if properly served, and renders the appeal ineffectual for any purpose. *We are not prepared* TO EXTEND THE RULE IN FLORIDA *as to the effect as an appearance of the taking of an appeal from a final decree, upon which error based on the insufficiency of service was relied upon with others, to an appeal from an* INTERLOCUTORY ORDER, WHICH INVOLVED ONLY THE QUESTION AS TO WHETHER THE APPELLANT WAS RIGHT-

FULLY IN COURT, *as in the Corbett case.* (Italics ours.)

"Conceding that there is no authority in the practice of Florida for special appeals, an appeal from an interlocutory order, questioning the sufficiency of service only, is authorized, and from this it is to be implied that an appellant is to derive some benefit from the appeal, which he could not do if the taking of the appeal constituted a general appearance on his part. It is not reasonably supposable that it was intended that the taking, as allowed by the statute, of an appeal from such an order as the one in question, should have the effect of depriving the appellant of the sole benefit sought to be obtained, or obtainable, by a resort to the remedy given. *In the absence of authority from the Florida Supreme Court, applying the general rule to the case of* SUCH AN INTERLOCUTORY APPEAL, *common sense requires us to decline to make the application.* (Italics ours). This contention is made by defendant in error, though there was a stipulation in the state court case, that the supersedas should not constitute a general appearance."

It would be difficult indeed to state in clearer or plainer language than is done by the sentences italicized in the foregoing quotation, the reasons why there is no conflict between the Federal and State Courts.

B. UNDERLYING PRINCIPLES.

There can be no question of respondent's right to have entered the special appearance in the State

Court and that such special appearance did not constitute a general appearance:

Standley v. Arnow, 13 Fla. 361;
Tidwell v. Witherspoon, 18 Fla. 282;
Seacoast Lumber Co. v. R. J. and B. F. Camp Lumber Co., 63 Fla. 604;
Harkness v. Hyde 98 U. S. 476, 25 L. Ed. 237;
Davis v. Cleveland, C. C. & St. L. R. Co., 217 U. S. 157, 54 L. Ed. 708.

Let us next examine what character of participation appears by respondent in these chancery cases after respondent's motions to quash service had been denied. Going a trifle outside the record in this particular case, and inspecting the records in the four companion cases now before this Court, it will be found that there were sixteen of these Chancery cases and that in fourteen of the cases stipulations were entered into, all of which substantially provided:

"That proceedings in this cause be stayed pending the prosecution of an appeal from the orders of the court overruling the motions of the said defendant to quash service in the case of J. H. Corbett vs. Rome Insurance Company, et. al., which said case is now on trial and being prosecuted in this Court.

"That the ultimate decision of the said appeal in said case of J. H. Corbett vs. Rome peal in said case of J. H. Corbett vs. Rome Insurance Company shall be decisive of the validity of the service by publication on said defendants in this case, and if the service in the said Corbett case be ultimately held defective, and ordered quashed, then the service in this case, the validity of which involves

identically the same legal questions as that in the Corbett case, shall be held defective and shall be quashed; and

" That *this stipulation of Counsel shall not be considered as constituting a general appearance of the said defendants in this cause;*"

Respondent was one of the defendants referred to in this stipulation.

For some reason petitioner now completely ignores the portion of this stipulation above italicized. This portion of the stipulation is especially noteworthy in view of the second stipulation entered into by petitioner's then counsel, together with a pointed statement in the opinion of the Supreme Court of Florida.

In the remaining two of these sixteen Chancery suits, "special appeals" were taken to the Supreme Court of Florida from the interlocutory orders of the Chancellor denying the motions to quash service. These cases are known as *Rome Insurance Co. et. al. vs. Corbett*, 66 Fla. 438 and *Rome Insurance Co. et. al. vs. Carter*, 66 Fla. 441.

In these appealed cases, were filed the stipulation with reference to respondent's application for supersedeas not constituting a general appearance. (Page 4 of this brief).

This second stipulation, petitioner now also completely ignores. Here again is forcibly exhibited the fact that petitioner's present counsel are strangers to the State Court cases. These counsel did not live with those cases, and, whatever the cause may be, do not display an understanding of them. The counsel who represented petitioner in the State Courts did not attempt to violate any of these stipulations before

the Florida Supreme Court. Note the following from that Court:

> "It may well be that this appeal so operates as a general appearance in the circuit court, as to render the question before us a moot one, *but the appellee does not ask us so to hold.*" Italics ours) *Rome Ins. Co. v. Corbett*, 66 Fla. 438, 439.

Section 1908, *General Statutes of Florida*, allows an appeal from interlocutory decrees in chancery. This statute reads:

> "From interlocutory decrees. Appeals may be taken and prosecuted from any interlocutory order, decision, judgment or decree of the circuit courts of this state, when sitting as courts of equity; but the conferring of the right shall not be construed so as to deprive either party from deferring and postponing the entry of his appeal until after the entry of the final decree, or end of the cause as prescribed by law; nor shall such postponement of the appeal be decreed, held or taken to be an acquiescence in the propriety of any interlocuotry order or decree made in the progress of the cause, or any waiver of any error therein."

Section 1906, *General Statutes of Florida*, provides:

> "Appeals in chancery shall be matters of right."

A ruling that the defendant is properly in Court

in such an order as may be appealed from. *Agnew v. Adams*, 24, S. C. 86.

Therefore when respondent exercised its "right" to appeal from the interlocutory orders of the Circuit Court over-ruling its motion to quash service, and when every pleading or paper which respondent filed in prosecuting said special appeal was emphatically limited to a special appearance, we submit that it entered a true special appeal analogous to a special appearance in a lower court, and that such an appeal does not constitute a general appearance. To hold that such an appeal did constitute a general appearance would be to deprive respondent of the "*right*" to appeal expressly given it by Statute.

In the declaration of rights of the *Constitution of Florida*, Section 4 provides:

> "SECTION 4: All courts in this state shall be open, so that every person for any injury done him in his lands, goods, person or reputation shall have remedy, by due course of law, and right and justice shall be administered without sale, denial or delay."

To hold the prosecution of the special appeal to constitute a general appearance would be to place a penalty on the exercise of the *right* to appeal. Such a holding would be a denial of justice.

A judgment of a Court upon its own powers ought never to be final, or else a court would be empowered, however limited its jurisdiction, to take upon itself unbounded jurisdiction.

Respondent is entitled to have the law laid down correctly. If the Hamilton County Court proceeded erroneously under the service attempted

to be had upon respondent in the chancery cases, respondent has the right to be protected from such erroneous orders. The *right* is given by statute, though this statute would, from the standpoint of justice, appear to be merely declaratory of the common law, using common law in its broad sense. For *is not the object of law the protection rather than the over-throw of legal rights?*

The crucial test is this: How could a court of justice come to the conclusion that the orders of the Florida Circuit Court specially appealed from were erroneous, and then declare that the presenting of these erroneous orders to the Supreme Court of Florida for the purpose of having them corrected, completely nullified the effect of the correction? How could a judicial tribunal announce the law to be that these special appellants had been subjected to erroneous orders of the Florida Circuit Court, and in the same breath say that their ascertaining this fact deprived them of any benefit therefrom? If insufficient service had been made upon the special appellants, why should they be punished for attempting to demonstrate that fact? *Why should the special appellants be penalized for insisting on their rights?* We insist that the only answer to these questions which will be in harmony with the declaration in Section IV of the Bill of Rights of the Florida Constitution, that justice shall not be denied, is to hold these chancery appeals to be true special appeals, and that their prosecution did not constitute a general appearance. *To enforce a right should not be to lose it.* This would be contrary to natural justice.

True it is that special appellants filed several

papers in the Supreme Court of Florida, as well as in the Circuit Court of Hamilton County. But they did nothing which was unnecessary in order to protect their rights and to enable them to go before the Florida Supreme Court to present the orders of the Circuit Court specially appealed from. Special appellants were not responsible for the fact that so many papers must be filed in order to prosecute an appeal. Because special appellants have complied with the requirements of the law for prosecuting an appeal could be no ground for declaring that they have entered a general appearance.

The fact that special appellants had information of these chancery suits cannot of itself affect in any way the question of what constitutes a general appearance. A defendant in making a motion to quash service in the Circuit Court has just as much information of the suit as had special appellants of these suits in which they prosecuted special appeals. The mere fact that special appellants had information of the suit and moved to quash service did not bring them into Court, provided the pleadings had been limited to a special appearance.

The question is not, was respondent informed of the chancery suits, but is, had it been legally service with process? If every sheriff in the State of Florida had gone to Georgia and delivered a copy of a subpoena to appear in this suit personally to each officer and director of respondent bank and read the subpoena to each of these officers, this would not constitute service. It would, however, have been information. In *National Metal Co. v. Greene Consolidated Copper Co.*, 11 Ariz. 108, 89 Pac. 535, 9 L. R. A. (N. S.) 1062, it is pertinently said:

"Where there is no service, there is no notice, irrespective of any knowledge which the defendent may acquire informally. Notice is given only by a service of process. Informal knowledge will not supply it, and cannot be relied upon to put the one acquiring the knowledge upon notice, or to force him into court to defend himself. The Supreme Court of the United States recognized this in *Connecticut Mut. L. Inc. Co. v. Spratley*, 102, U. S. 612, 43 L. Ed. 572, 19 Sup. Ct. Rep. 308. After reference to certain notices provided to the company, it is said: 'We do not intimate that mere knowledge or notice as thus provided would be sufficient without a service on the agent in the state where suit was commenced.' Again: 'Process sent . . . . (to a non-resident) out of the state, and process published within it, are equally unavailing in proceedings to establish his personal liability.' *Pennoyer v. Neff*, 95 U. S. 727, 24 L. Ed. 570. Still further: 'No court can exercise, at common law, jurisdiction over a party, unless he is served with the process within the territorial jurisdiction of the court, or voluntarily appears.' *Mexican C. R. Co. v. Pinkney*, 149 U. S. 209, 37 L. Ed. 705, 13 Sup. Ct. Rep. 865. 'It is not sufficient,' says *Alderson* in *Judicial Writs & Process*, pp. 227, 228, Sec. 111, 'That a defendant have actual notice (knowledge) of a proceeding against him; he must be summoned in a legal manner.' The point we are making is clearly pointed out again by the Supreme Court of the United States in *Fitzgerald & M. Constr. Co. v. Fitzgerald*, 137 U. S. 98, 34 L. Ed. 608, 11 Sup. Ct. Rep. 39, as follows: 'So that, whether the president of the company was inveigled into Lancaster County or not, the service upon him amounted to more than an informal notice on-

> ly, and did not bring the company into court, and this the company was bound to know, and must be held to have known. Without regard to the evidence relied on to show that there was concealment of the circumstances in relation to the service, knowledge of these circumstances was wholly immaterial, in view of the fact that the service was unavailing to bring defendant into court unless it chose to come there."

Furthermore, we can no more construe the purpose and effect of a pleading or other paper filed in a suit by looking only to a portion of it, than we can interpret any other written instrument by picking out only selected portions. Pleadings, like contracts, deeds, wills, statutes, court orders, and judicial opinions, are to be construed by looking at the four corners of the document. It may be, perchance, and not infrequently is, determined that a pleading when so examined is held to be a nullity. But no court can add to or detract from a pleading any more than it can add to or detract from the terms of any other written instrument.

When we look at every pleading, paper, or even bond filed by special appellants in the Supreme Court of Florida, it becomes apparent that these pleadings and other papers were and could only be one of two things:

(1st) They were either so limited that they could not do other than amount to a special appeal —their definite limitations would absolutely stand in the way of their amounting to a general appearance, or

(2nd) The limitations conspiciously written

into these papers were so drastic that the papers were a nullity.

When the Florida Supreme Court accepted the transcripts of record, and rendered its decision based thereon, it decided that the pleadings etc., were not nullities; but neither the Florida Supreme Court nor any other Court could re-write these pleadings or make them other than what the parties had made them. Therefore the Florida Supreme Court must be held to have accepted these transcripts as filed in and amounting to a special appeal. The Florida Supreme Court certainly did not hold otherwise, for they expressly stated that:

> "These non-residents have sued out *what they term a special appeal.* (Italics ours.)
>
> "It may well be that this appeal so operates as a general appearance in the Circuit Court, as to render the question before us a moot one, but the appellee does not ask us to so hold, and it appears that this is but a test case, upon the decision of which many other cases in that court are depending." *Rome Insurance Co. vs. Corbett*, 66 Fla. 438, 439.

Moreover, the then counsel on the other side were convinced of the soundness of our position.

Special appeals of this character are not new, and so far as we have been able to find authorities upon this point, they are uniform in holding that such an appeal does not constitute a general appearance.

> *Columbia Screw Co. v. Warner Lock Co.*, 138 Cal. 445, 71 Pac. 498.
>
> *Freer v. White*, 91 Mich. 74, 51 N. W. 807;

Craighead v. Martin, 25 Minn. 41;
Hurlburt v. Palmer, 39 Neb. 158, 57 N. W. 1019;
Lyons v. Miller, 2 N. D. 1, 48 N. W. 514;
Paxton v. Daniel, 1 Wash. St. 19, 23 Pac. 441;
Dikeman v. Mrotek, 76 Wis. 332, 45 N. W. 118.

Freer v. White, supra, is specific authority for a "special appeal." Said the Court in that case:

> "After the *SPECIAL APPEAL* was taken to the circuit court, defendant's attorney, Mr. Sweezey, caused his appearance to be entered in that court. and it is claimed that this was a waiver of the defect, and conferred jurisdiction upon the court to proceed with the case. But when it is considered in connection with the *SPECIAL APPEAL it would be presuming against the fact to assume that there was any intention on the part of the defendant to submit himself to the jurisdiction of the court.*" (Italics ours).

"*Non potest adduci Exceptio ejusdem Rei cujus petitur Dissolutio.*" (A matter, the validity of which is at issue in legal proceedings cannot be set up as a bar thereto). *Broom's Legal Maxims*, 8 ed. 133.

C. First Distinction Between State and Federal Rulings—No Voluntary Appeal.

Petitioner refers to the holdings of the Florida cases to the effect that:

> "As the appellant has made herself a party to the suit by *voluntarily* (italics ours) ap-

> pearing and prosecuting her appeal, she must, upon the return of the cause to the Circuit Court, be considered as regularly before the court in like manner as if she had been duly served with process," *Standley v. Arnow*, 13 Fla. 361.

We call attention to just what was announced in *Standley vs. Arnow, supra.* The Court states that since appellant made herself a party to the suit by voluntarily appearing, etc., she must be considered as regularly before the court. *The word* VOLUNTARILY *marks one of the distinguishing features between all holdings of the Florida Court, and the present case.* Special appellants showed as far as it was possible to be shown, that they had not voluntarily appeared, either in the lower or the appellate court. They no more voluntarily appeared to prosecute their special appeal than they did when they entered their special appearance in the lower Court and moved to quash service. The one cannot constitute a voluntary or general appearance more than the other.

To show how the subsequent Florida cases dealing with the question of an appeal constituting a general appearance are founded on *Standley vs. Arnow*, we quote from these latter cases:

In *Tunno & Jessup & Co. v. Robert*, 16 Fla. 738, on page 751 the Court says:

> "The persons composing the firm of M. K. Jessup & Co., having appeared upon this appeal in this court, upon the return of the cause to the Circuit Court must be considered as regularly before this Court in like manner

as if duly served with process. 13 Fla. 368; 1 Pike 50, 376, 386, 405; 4 Bibb 84, 167."

In this case the reference to 13 Fla. 368 is to the quotation taken above from *Standley vs. Arnow*.

In *Shrader v. Shrader*, 36 Fla. 502, on page 518 the Court says:

> "Mrs. Shrader, the appellant in Case No. 2 having by her appeal made herself a party to such case, should proceed to plead to the bill of complaint therein. *Standley vs. Arnow*, 13 Fla. 361."

In *Wylly v. Sanford Loan & Trust Co.*, 44 Fla. 818, 820, the Court says:

> "The appeal of the defendants operated as an appearance in the cause however, which will enable the Court below now to proceed in the matter. *Standley vs. Arnow*, and *Finlayson v. Lipscomb, supra.*"

The reference to *Finlayson v. Lipscomb* in the last quotation is meant to be the case of *Tunno & Jessup & Co. v. Robert*. This is shown by looking up the citation given for *Finlayson v. Lipscomb* earlier in the opinion in *Wylly v. Sanford Loan & Trust Co.*

In *Rumeli v. City of Tampa*, 48 Fla. 112, on page 114 the Court says:

> "The appeal of the defendant Rumeli operated as an appearance in the cause, however, which will enable the Court below to proceed in the matter. *Wylly v. Sanford Loan & Trust Co.*, 44 Fla. 818."

This case as seen follows point-blank *Wylly v. Sanford Loan & Trust Co.*, which in turn follows *Standley v. Arnow* and *Tunno & Jessup & Co. v. Robert. Tunno & Jessup & Co. vs. Robert* has been seen to refer directly back to *Standley v. Arnow*.

Thus we see that *Standley v. Arnow, supra*, is the case which each subsequent Florida case either cites directly as the authority for its holding, or is the case to which each of these subsequent cases leads back as its basis.

Petitioner contends that the special appearance was a "voluntraily" proceeding though presenting not a single authority in support thereof.

The authorities seem to be unanimous that *such a proceeding is not voluntary.*

In *Craighead v. Martin*, 25 Minn., 41, it is said:

> "It would seem too plain for argument that such an act, which in itself is a denial of all authority in the justice cannot be regarded as a voluntary appearance, and express recognition of his authority."

In *Freer v. White*, 91 Mich. 74, 51 N. W. 807, the Michigan Court pertinently said:

> "It would be presuming against the fact to assume that there was any intention on the part of the defendant to submit himself to the jurisdiction of the court."

In *Pugh v. Loisel*, 219 Fed. 417, 424, (5th C. C. A.) is the following:

> "He is not to be held to have voluntarily submitted himself to the jurisdiction of that

court by protesting against its exercise of jurisdiction. *Big Vein Coal Co. v. Read*, 229 U. S. 31, 33 Sup. Ct. 694, 57 L. Ed. 1053."

This last Court again in *Smith v. Government of Canal Zone*, 249 Fed. 273, 278, said:

> "This appellant's admission of the court's jurisdiction, or consent to the exercise of it, is not to be inferred or implied from a previous explicit denial of its jurisdiction, though such denial was based upon grounds other than the one stated in the motion to set aside the service of process. *A denial of jurisdiction is not to be given effect as an admission to it.* (Italics ours). *Big Vein Coal Co. v. Read*, 229 U. S. 31, 33 Sup. Ct. 694, 57 L. Ed. 1053; *Pugh v. Loisel*, 219 Fed. 417, 135 C. C. A. 221."

In *Harkness v. Hyde*, 98 U. S. 476, 478, 25 L. Ed. 237, this Court said:

> "Illegality in a proceeding by which jurisdiction is to be obtained is in no case waived by the appearance of the defendant for the purpose of calling the attention of the court to such irrregulariy."

This Court further said *In the matter of Indiana Transportation Co.*, 244 U. S. 456, 458, 61 L. Ed. 1253, 1255:

> "Persons by becoming suitors do not place themselves for all purposes under the control of the Court."

D. Second Distinction Between State and Federal Rulings—No Adjudication or Contest on Merits.

Special appellants in no way contested the chancery suits on the merits. They appeared specially for one purpose only. This purpose was to settle the question of service. No other question has been raised by any of the defendants. There had been no adjudication whatever on the merits.

Jurisdiction is founded upon service, or, as the Federal Supreme Court says, upon "physical power" which is obtained only by due service of process. The first question to be settled in any case is that of jurisdiction. Said this Court in *Heald vs. District of Columbia*, decided November 8th, 1920:

> "As the want of power in the court below to make the certificate has been suggested, and as that naturally arises on the face of the record, and will, if well founded, preclude present inquiry into further questions, we come to consider that suggestion."

And we also quote from the dissenting opinion of Mr. Justice Baldwin in *Ex Parte Crane*, 5 Pet. 190, 200, 8 L. Ed. 92, 96 as follows:

> "As the first question which this motion presents is one of jurisdiction and power of this court to grant the writ prayed for in this case, it will be following the rule established to consider it first (3 Cranch. 172; 1 Peter's Condensed Reports, 159; 5 Cranch. 221; 10 Wheaton, 20; 1 Cranch. 91; 9 Wheaton, 816): a rule which

> never ought to be disregarded where a question of power arises."

Courts will settle questions of jurisdiction, whenever possible, preliminary to entering upon the cause. This is precisely and solely what the present respondent requested of the Court in the chancery cases. After the chancery Court assumed to go into the merits of those cases, the present respondent refrained from the slightest participation.

In each of the cases cited by petitioner in which the Florida Supreme Court held an appeal to constitute a general appearance, the appeal was upon an adjudication of the merits of the case, and not merely upon a ruling on the question of service—with the single exception of the case of *Rome Insurance Co. v. Corbett* which is the decision we are here analyzing and which we are emphatic in asserting does not hold what petitioner contends (pages 28 and 34 of this brief.

In *Rumeli v. Tampa*, 48 Fla. 112, 37 Sou. 563, the appeal was from a final decree although this is not clear from the report of the case. We quote from a letter written by the Clerk of the Florida Supreme Court:

> "The record in the case of *Rumeli v. City of Tampa*, 48 Fla. 112, shows that Judge Wall entered a final decree in said cause November 7, 1903, a decree *pro confesso* having been entered therein November 2, 1903. The final decree purported to run against Rumeli as well as against the other defendants named in the bill."

It thus appears that, without a single exception,

in every case in which the Florida Court held an appeal to constitute a general appearance, the appeal was taken after entry of final decree.

A second distinction between this Corbett case and all other Florida cases is the lack, in the Corbett appeal, of any adjudication or contest whatsoever on its merits.

Furthermore five of the cases cited by counsel are decisions on writs of error at common law, and are not in point.

These cases are:

Drew Lumber Co. v. Walter, 45 Fla. 252;
Hayman v. Neil, 53 Fla. 127;
Barnick v. Rouse, 53 Fla. 643;
Busard v. Hutson, 65 Fla. 479;
Henry v. Spitler, 67 Fla. 146.

Unlike Florida chancery practice allowing appeals from interlocutory orders (page 28 of this brief), common law writs or error are allowed in Florida only after final judgment.

Section 1691 of the General Statutes of Florida reads:

> "*Writs of error—only from final judgments*: Writs of error shall lie only from final judgments except as specified in Section 1695."

Section 1695 of the Florida General Statutes, referred to in the section just quoted, allows writ of error to the party aggrieved by the granting of a motion for new trial, without waiting for final judgment. Even so a writ of error follows a contest on the merits.

That an appeal solely upon questions of service or jurisdiction over a defendant is not a general appearance, see cases collated on pages 34-35 of this brief.

E. REAL HOLDING OF FLORIDA COURT.

The Florida Supreme Court did not hold the so called constructive service to be a valid service, nor the special appeal to be a general appearance. What it did hold was that this so called service was a mere notice, (meaning mere information,) which may be paid attention to or not, as the defendant may choose. Said the Florida Court:

> "The purpose of the statute authorizing constructive service by publication is to notify non-residents of the pending suit so that they may if they care to do so, come into the case, and if the statute be followed, there is no right in the non-resident to quash this *notice;* he has his right if not waived, to object should the court thereafter commit an error against him," (italics ours) *Rome Ins. Co., et. al. vs. Corbett*, 66 Fla. 438, 440.

Therefore, the most that can be said is that respondent received a notice or was informed that sixteen chancery suits had been brought against it, which notice or information was lawfully given. This notice or information to respondent did not give the chancellor "physical power" *in personam* over respondent.

The giving of this notice or information is not

"confined in its operation to the cases where the court might make final decree or judgment. . . . It was not intended that the question of the power to enter the ultimate decree or judgment should enter into the question of the right to give notice of the suit to a non-resident. . . . . We are not to assume upon the face of the bill that the Circuit Court will enter an unauthorized decree." Quoted from *Rome Ins. Co. vs. Corbett*, 66 Fla. 438.

But the Circuit Court of Hamilton County did proceed to enter an unauthorized decree—a decree beyond its power to enter—a decree falling within that class of cases in which a mere notice or information of suit to a non-resident does not permit of the making of a final decree or judgment. Such a decree is just as much a nullity, as was the judgment held void in *Pennoyer v. Neff*, 96 U. S. 714, 24 L. Ed. 565.

There is no presumption in favor of jurisdiction, where the service is constructive and the defendant a non-resident. In *Myakka Co. v. Edwards*, 68 Fla. 382, the Supreme Court of Florida held:

> "Jurisdiction must be affirmatively shown by the record where the parties defendant are shown to be non-residents and constructive service is depended upon for jurisdiction."

III

FEDERAL COURT ENTITLED TO EXERCISE ITS OWN INDEPENDENT JUDGMENT

A. Upon Questions of Service Upon Non-Residents.

Had there existed such conflict as petitioner contends, the Federal Court should exercise its own independent judgment upon the validity and effect of service of process attempted by the Florida State Court upon this respondent foreign corporation bank. The Courts of the United States will not leave a foreign corporation to the mercy of the decisions of State Courts respecting the validity and effect of a purported service, either actual or constructive:

Goldney v. Morning News, 156 U. S. 518, 39 L. Ed. 517.
Barrow Steamship Co. v. Kane, 170 U. S. 100, 111, 42, L. Ed. 964, 968.
Conley v. Mathieson Alkali Works, 190 U. S. 406, 47 L. Ed. 113;
Mechanical Appliance Co. v. Castleman, 215 U. S .437; 54 L. Ed. 272;
Riverside & D. R. Cotton Mills, v. Menefee, 237 U. S. 189, 59 L. Ed. 910;
Meisukas v. Greenough Red Ash Coal Co., 244 U. S. 54, 61 L. Ed. 987.

We would also refer to the recent pertinent statement of Mr. Justice McKenna in *Chipman, v. Thomas B. Jeffrey Company*, 251 U. S. 373, 64 L. Ed. 314:

"In resting the case on New York decisions

we do not wish to be understood that the validity of such service as here involved would not be of Federal cognizance, whatever the decision of a state court, and refer to *Pennoyer v. Neff*, 95 U. S. 714, 24 L. Ed. 565; *St. Louis Southeastern R. Co. v. Alexander, supra, Philadelphia & R. R. Co. v. McKibbin*, 243 U. S. 264, 61 L. Ed. 710; 37 Sup. Ct. Rep. 280; *Meisukas v. Greenough Red Ash Coal Co.* 244 U. S. 54, 61 L Ed. 987, 37 Sup. Ct. Rep. 593; *People's Tobacco Co. v. American Tob. Co.* 246 U. S. 79, 62 L. Ed. 587, 38, Sup. Ct. 223, Ann. Cas. 1918 C, 537."

B. Upon Rights Under Negotiable Instruments.

Furthermore, the rights of holders of commercial paper are here involved, and in such cases the Courts of the United States exercise their own independent judgment:

Pana v. Bowler, 107 U. S. 529; 27 L. Ed. 424;
Presidio County v. Noel-Young Bond & Stock Co., 212 U. S. 58, 73; 53 L. Ed. 402, 408;
Rollings v. Lake County, 34 Fed. 845, per Brewer, J;
Bank of Edgefield v. Farmers Cooperative Mfg. Co., 52 Fed. 98, (5th C. C. A.)
Town of Newberne v. National Bank of Barnesville, Ohio, 234 Fed. 209, (6th C. C. A.)

The property right of the holder of a negotiable instrument is different from the right of the owner of real property or other personal chattels, as pointed out in *Town of Enfield v. Jordan*, 119 U. S. 680, 693, 30 L. Ed. 523, 529:

"Rights to real property and personal chattels within the jurisdiction of the court, and subject to its power, may be affected by *lis pendens*, but not those acquired by the transfer of negotiable securities or by the sale of articles in market overt in the usual course of trade."

Said Mr. Justice Story in *Swift v. Tyson*, 16 Peters 1, 19, 10, L. Ed. 865, 871:

"The law respecting negotiable instruments may be truly declared in the language of Cicero, adopted by Lord Mansfield in *Luke v. Lyde*, 2 Burr, R. 883, 887, to be in a great measure, not the law of a single country only, but of the commercial world. *Non erit alia lex Romae, alia Athenia, alia nunc, alia posthac, sed et apud ommes, ge'es et omni tempore, una eademque lex obtinel* "

CONCLUSION

Penetrating the veil of pleading, the controlling facts are simply;

(a) Respondent, a citizen and resident of Georgia, held the promissory note of petitioner, a citizen and resident of Florida;

(b) Suit was brought against petitioner and respondent in Florida by a third party alleging respondent's negotiable instrument was obtained by fraud and was void.

(c) Service by publication was attempted upon respondent;

(d) Decree was entered declaring respondent s promissory note void.

The intervention of the third party as complainant in the Florida suit is not an important detail. If the third party could sue, petitioner itself would equally have been entitled to sue.

If the State Court decrees should be held good by this Court, no greater blow would ever have been dealt negotiable instruments. If these decrees are good, every holder of such paper given by a citizen of a foreign State is subject to the possibility, when payment is demanded, of being met with a decree of a Court of the debtor's State, entered solely upon constructive service, declaring that the payee holds a mere scrap of paper, void and uncollectable. It is submitted that such cannot be the law.

Respectfully submitted,

W. E. KAY,
J. L. DOGGETT,
L. A. DEAN,
HENRY C .CLARK.

Attorneys and Counsel for Respondent.

FILE NO. 27,729

IN THE

Supreme Court of the United States

October Term, 1921

No. 77

THE BANK OF JASPER,
A CORPORATION,

Petitioner,

vs.

THE STATE BANK OF ROME,
A CORPORATION,

Respondent.

SUPPLEMENTAL BRIEF FOR RESPONDENT

W. E. KAY,
J. L. DOGGETT,
L. A. DEAN,
HENRY C. CLARK,
Attorneys and Counsel for Respondent.

IN THE

Supreme Court of the United States

THE BANK OF JASPER, A CORPORATION *Petitioner*	October Term, 1921
VERSUS	
THE STATE BANK OF ROME, GEORGIA, A CORPORATION *Respondent*	No. 77

SUPPLEMENTAL BRIEF FOR RESPONDENT

Petitioner's brief was not prepared in time to permit reply thereto in Respondent's main brief. Hence this supplemental brief.

I.

If Respondent had delayed appealing from the order of the Circuit Court of Hamilton County, Florida, until after final decree, then the discussion on pages 18 *et seq* of Petitioner's brief might have some applicability.

The distinction between the special appeals under consideration and all appeals held by the Florida

Supreme Court to constitute a general appearance, may be made more sharply apparent by an illustration. Respondent did not come *in contact with* the merits of the State Court cases. The "merits" of those cases may be likened to an electric wire. If no contact with the wire occurs, no harm is done. Respondent's special appeals not having come in contact with the merits are unharmed. Stretching the adjudications of the Florida Supreme Court to their limit, the most they hold is that *by coming in contact with the merits of the case through an appeal* AFTER A FINAL DECREE, *the question as to service is electrocuted.*

The Florida Supreme Court in *Rome Insurance Company et al, v. Corbett*, 66 Fla. 438, so to speak, played with the matter of these "Special Appeals" constituting a general appearance, but let it go. The Florida Supreme Court in the Corbett case recognized that that case presented a situation different from those cases in which the appeal had been held to constitute a general appearance.

II.

The inapplicability of garnishment cases to the instant case is well shown by *Pennington v. Fourth National Bank*, 243 U. S. 269, 61 Law. Ed. 713, which is cited and relied upon on pages 55 and 57 of Petitioner's brief. That case presented merely a form of garnishment in equity. If Mrs. Pennington's application for an order of Court to tie up her husband's bank account in the Fourth National Bank had denied that such an account existed and had denied that her husband had any money in the Fourth National Bank, is it to be supposed the

Court in the face of such an application would have entered an order against the Bank restraining it from paying money to the husband?

A denial in a bill that funds exist cannot support a prayer in the same bill that payment of the same identical funds be enjoined.

Mrs. Pennington was declared to be a creditor of her husband and therefore entitled to garnish his bank account. *The Complainants in the Florida State Court cases were not creditors* in any sense of the term. *They were debtors* undertaking to avoid their debt.

We have in Florida a statute providing for EQUITABLE GARNISHMENT. This is Section 1918 of the General Statute of Florida and reads:

> PROCEEDINGS PRESCRIBED. — If any suit shall be commenced for relief in equity in any court against any defendant residing out of this State, and any other defendant within the same having in his hands effects of, or being otherwise indebted to, such absent defendant, and the appearance of such absentee be not entered and security given to the satisfaction of the court for performing the decree, upon affidavit that such defendant is out of the State, or that upon inquiry at his usual place of abode he cannot be found so as to be served with process, the court may make an order and require surety, if it shall appear necessary, to restrain the defendant in this State from paying or conveying away, or secreting the debts by him owing to, or the effects in his hands, of such absent defendants, or to restrain the absent defendant from conveying away or secreting or removing the property in litigation, or make an order sequestrating the property which may be neces-

sary to secure the plaintiff if he finally succeeds; and may order such debts to be paid, and effects to be delivered up to said plaintiff, upon his giving sufficient security for the return thereof.

"Service upon the absent defendant shall be had in the manner provided by law, and if the defendant does not appear and answer, plead or demur to the bill, decrees pro confesso and final decree may be ordered as in other cases; and the court shall make an order requiring the complainant to give security, to be approved by the court or by its clerk, for abiding such future orders as may be made for restoring the estate or effects to the absent defendant upon his appearance and answering the bill; and if the complainant shall refuse to give or not be able to procure such security, the effects shall remain under the direction of the court, in the hands of a receiver, or otherwise, for so long a time, and shall be disposed of in such manner, as to the court shall seem fit."

Respondent's counsel gave careful study to this Statute when the State Court suits were first filed, and by reason of the emphatic denials in the bills that any debt existed saw clearly that the Statute did not support the bills in any particular.

III.

Petitioner argues that Respondent did not question the effect of the State Court decrees in the Federal District Court and states that the only ground of demurrer which in any way could have done this was the first ground of the demurrer to the pleas in question. See page 78 of Petitioner's brief.

The last ground of this demurrer specifically

raises the very point mentioned. This ground of demurrer reads:

> "No decree entered in said chancery suit could effect the rights of the plaintiff herein arising out of the certificate of deposit set up in said court." (R 18)

Again each replication which Respondent filed to said pleas concludes with language to the following effect:

> "Wherefore this plaintiff says that no decree entered in said chancery suit of C. L. Adams vs. Rome Insurance Company et al., could effect or take away any of the rights of the plaintiff herein, arising out of the certificate of deposit herein sued upon." (R 22)

The ground work of Respondent's position from the inception of the State Court cases has been the principles laid down in *Pennoyer vs. Neff*, 95 U. S. 714, 24 L. Ed. 565 and *Hart vs. Samson*, 110 U. S. 151, 28 L. Ed. 101.

Respondent's theory has been consistent and unaltered in every argument from first to last throughout the various stages of this litigation. The Federal District Court had squarely presented to it not only in the argument but in the pleadings, as above shown, the very propositions which Respondent now contends for and has contended for throughout.

Respectfully submitted,

W. E. KAY,
J. L. DOGGETT,
L. A. DEAN,
HENRY C. CLARK,
Attorneys and Counsel for Respondent.

Affirmed.

BANK OF JASPER *v.* FIRST NATIONAL BANK OF ROME, GEORGIA.

FIRST NATIONAL BANK OF JASPER, FLORIDA, *v.* STATE BANK OF ROME, GEORGIA.

FIRST NATIONAL BANK OF JASPER, FLORIDA, *v.* FIRST NATIONAL BANK OF ROME, GEORGIA.

BANK OF JASPER *v.* STATE BANK OF ROME, GEORGIA.

CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

Nos. 76, 73, 74, 77. Argued January 12, 1922.—Decided February 27, 1922.

1. Under the law of Florida, an appeal to the State Supreme Court, taken solely to review an interlocutory order overruling a motion

to quash a pretended service by publication for want of jurisdiction, does not operate as a general appearance. P. 117.

2. By an arrangement between a corporation, its agent and a bank, purchasers of the corporation's shares were allowed to discount their notes at the bank, the resulting credits were transferred by the bank to the account of the agent in payment for the shares, and negotiable certificates of deposit were issued by the bank to the agent. *Held* that the certificates of deposit did not represent funds in the bank which as *res* could sustain service by publication upon a nonresident purchaser of the certificates in suits brought by the shareholders in the state court against such purchaser, the bank, the vendor corporation and its agent to have the proceeds of the notes impressed with a trust in plaintiffs' favor and annul their purchases and notes and the certificates on the ground of fraud in selling the shares; and that judgments based on such service, were void. P. 118.

264 Fed. 83, affirmed.

These were actions in the District Court for the Southern District of Florida, brought by the present respondents, respectively, as indorsees of certificates of deposit issued by the respective petitioners. The petitioners pleaded *res judicata*, based on judgments rendered by the Florida courts in suits to which it had been sought to make the respondents parties through service by publication. The District Court held the service valid and the judgments conclusive; but the Circuit Court of Appeals held otherwise, and its judgments, reversing those of the District Court, are here by certiorari.

Mr. F. P. Fleming, with whom *Mr. C. Seaton Fleming* was on the briefs, for petitioner in Nos. 76 and 77.

Mr. William Wade Hampton, for petitioner in Nos. 73 and 74, submitted. *Mr. Hilton S. Hampton* and *Mr. S. S. Sanford* were also on the briefs.

Mr. Henry C. Clark and *Mr. W. E. Kay*, with whom *Mr. J. L. Doggett* and *Mr. L. A. Dean* were on the briefs, for respondents.

MR. JUSTICE BRANDEIS delivered the opinion of the court.

These cases were argued and submitted together. They involve the same questions of law and the essential facts are the same in each. Reference will, therefore, be made only to No. 76.

The First National Bank of Rome, Georgia, endorsee of five certificates of deposit made by the Bank of Jasper, a Florida corporation, sued the maker at law in the federal court for the Southern District of that State. The defendant pleaded in bar seven decrees of the Circuit Court for Hamilton County, Florida, entered in suits in which the Georgia bank had been named as one of the respondents. The plaintiff replied that the suits in which these decrees were entered were *in personam;* that it was and is a non-resident of Florida, had not been found within the State, and had not appeared in those suits except specially to move to quash the pretended constructive service upon it by publication; and that the decrees are as to it of no legal effect. The District Court sustained the plea of *res judicata* and entered judgment for defendant. The judgment was reversed by the Circuit Court of Appeals. See *First National Bank of Rome* v. *First National Bank of Jasper,* 264 Fed. 83. The case comes here on writ of certiorari. 254 U. S. 622. Whether on the facts hereinafter set forth the state court acquired jurisdiction and the legal effect of the decrees are the matters presented for our consideration.

The Rome Insurance Company of Georgia wished to raise capital by selling shares of its stock. To aid it in so doing the American Bank and Trust Company, also of Rome, was appointed agent or trustee. These two companies selected Jasper, Florida, as the field of operations for the stock selling campaign; and they secured the Bank of Jasper as an ally. Then, to facilitate sales the

three devised the following plan: Purchasers of the stock were enabled to discount at the Jasper bank their one year notes for an amount equal to the purchase price, giving the stock as collateral; and the American Company as trustee for the Insurance Company agreed to deposit with the Jasper bank an amount equal to each discount, taking that bank's negotiable certificate of deposit in the usual form, payable in one year with interest at four per cent. Thus the stock purchased was paid for; the Jasper bank made discounts and received deposits; the Insurance Company raised capital and had it paid up—all without anybody parting with a cent in cash. Under this arrangement many citizens of Jasper bought stock in the Insurance Company. In time their notes, and likewise the corresponding certificates of deposit, matured. The purchasers of the stock discovered that it was worthless, and that they had been defrauded; the Bank of Jasper that it, also, had been defrauded and that its certificates of deposit had been transferred to the First National Bank of Rome. There was default on the certificates of deposit; and the First National Bank brought this action against the Bank of Jasper in the federal District Court. But a few days before it did so, each purchaser of stock had filed a bill in equity in the state Circuit Court against the Jasper bank and the three Rome corporations. It is the final decrees entered in these suits eighteen months later which are pleaded in bar of this action on the certificates of deposit.

Each bill recited, in substance, the above facts and alleged that the note given by the complainant was in the hands of the Jasper bank, that the proceeds [of the discount] were deposited with it, that the certificate of deposit issued to the American Company covers such proceeds, and that they have ever since remained in the bank. The bill prayed that these proceeds be impressed with a trust in favor of the complainant; that the First National

Bank of Rome be declared not to have any interest therein; that the certificate of deposit, the note and the contract to purchase the stock be declared void; that the American Company, the Insurance Company and the Jasper bank be restrained from bringing suit against the complainant; that the Jasper bank be restrained from making any payment to the First National Bank out of the proceeds of the complainant's note; and that the latter bank be restrained from withdrawing any part of such proceeds.

None of the three Rome corporations was domiciled or found in the State of Florida. Constructive service by publication in a newspaper was made under the Florida law. General Statutes, § 1866. Then the three corporations entered their "appearance specially, solely and only for the purpose" of moving to quash the service. The motion was overruled; the defendants were given time to plead, but did not do so; and again, appearing "specially, solely and only" for that purpose, entered their appeal to the Supreme Court of Florida from the order overruling the motion to quash the pretended service by publication. And also appearing "specially, solely and only" for that purpose, they applied to the Circuit Court for an order fixing the terms of the supersedeas on the appeal. That the notice of this application given counsel for complainant "shall in no sense operate as a general appearance" was stipulated by them; and, thereupon, the order of supersedeas was made and the required bond given. It was suggested in the Supreme Court that the appeal operated as a general appearance and, therefore, rendered the question submitted moot; but the court did not pass upon this objection. It declared that "the purpose of the statute authorizing constructive service by publication is to notify non-residents of the pending suit [in equity] so that they may, if they care to do so, come into the case, and if the statute be followed, there is no right in the non-resident to quash this notice; he has

his right if not waived, to object should the court thereafter commit an error against him." And it affirmed the order of the lower court. *Rome Insurance Co.* v. *Corbett* 66 Fla. 438.

The three Rome corporations took no further part in the suits in the state courts. But in the Circuit Court a decree *pro confesso* was entered as against all the respondents, which declared that the sale and purchase of the stock was void; that the proceeds of the complainant's note "included in said certificate of deposit No. 319 now held by the First National Bank of Rome are hereby decreed to be impressed with a trust in favor of the complainant and the same are adjudged to belong to him"; that the Bank of Jasper be enjoined from paying any part of these proceeds to the First National Bank; and that the certificate of deposit "in so far as it covers and includes the proceeds derived from the said note" was void. The Bank of Jasper insists that these decrees are *res judicata* of its alleged liability to the First National Bank on the certificates of deposit, first, because they are valid judgments *in personam* against the latter bank; and, secondly, because the certificates of deposit represent the proceeds of the notes, and these proceeds were a *res* within the jurisdiction of the court, and there was thus jurisdiction *in rem* to adjudicate the alleged liability on the certificates of deposit.

The contention that the decrees constitute personal judgments against the First National Bank rests upon the assertion that under the law of Florida an appeal operates necessarily as a general appearance, although the appeal is taken solely from an interlocutory order asserting jurisdiction, and, although in taking it, the appellant declares in terms that his appearance is special, and solely for the purpose of the appeal. It may be assumed that if such were the settled law of Florida, it would be accepted by this court as controlling. *York* v. *Texas*, 137 U. S. 15. But our attention has not been called to any Florida

statute or rule of court or decision which so declares. There is confessedly no statute or rule of court to that effect; and none of the cases relied upon support the proposition that such is the common law of Florida. This contention seems to have been made in the equity suits here under consideration; but the Supreme Court did not there pass upon the question. *Rome Insurance Co.* v. *Corbett, supra,* p. 439. It is clear that in Florida an appearance entered in the trial court specially for the purpose of moving to quash a summons does not operate as a general appearance. *Standley* v. *Arnow,* 13 Fla. 361, 368; but that if, after such a motion is made and overruled, the cause proceeds to final decree, a defendant who prosecutes an appeal therefrom will be held to have appeared generally. The appeal here in question was not from a final decree. It was from an interlocutory order overruling the objection to the jurisdiction. The right to review an interlocutory order by a separate appeal is conferred broadly by § 1908 of the General Statutes of Florida; and there is nothing to indicate that the right does not extend to orders concerning jurisdiction. It certainly may not be assumed that the legislature intended that exercise of the right conferred should operate as a general appearance and thus render moot a consideration of the ruling alone sought to be reviewed. Moreover, in none of the cases from the Supreme Court of Florida relied upon was it shown that the appearance on appeal was in terms special and limited to the review of the question of jurisdiction.[1]

The contention that the proceeds of the discounts of the notes constitute a *res* within the State, of which

[1] *Tunno* v. *Robert,* 16 Fla. 738, 751; *Shrader* v. *Shrader,* 36 Fla. 502, 518; *Wylly* v. *Sanford Loan & Trust Co.,* 44 Fla. 818, 820; *Drew Lumber Co.* v. *Walter,* 45 Fla. 252, 255; *Rumeli* v. *Tampa,* 48 Fla. 112, 114; *Hayman* v. *Weil,* 53 Fla. 127, 132; *Barwick* v. *Rouse,* 53 Fla. 643, 646; *Busard* v. *Houston,* 65 Fla. 479, 482; *Henry* v. *Spitler,* 67 Fla. 146, 150.

the certificates of deposit were merely evidence, rests upon a misapprehension. No specific fund was ever set apart by the Jasper bank. Its discounts resulted in general credits by the bank to the makers of the notes. These credits were applied in making payment for their stock. The payment was made by transferring to the credit of the American Company the amount which stood to the credit of the makers of the notes. The credits—called deposits—so transferred became an indebtedness of the Jasper bank to the American Company. That indebtedness, if it had rested in open account, would have been property of the creditor within the State of Florida. In an appropriate proceeding it might have been reached to satisfy a claim against its owner. *Pennington* v. *Fourth National Bank*, 243 U. S. 269. But the suits in the state court were not proceedings of that character. In them the complainant asserted that, by reason of the fraud alleged, the Jasper bank was indebted not to any of its corespondents, but to the complainant. Moreover, there was no indebtedness on open account to any of the Georgia corporations; for this account had been closed by giving certificates of deposit; and these had been transferred to the First National Bank. Such certificates are merely promissory notes of the Jasper bank, payable like unsecured notes of individuals, out of general assets. Like other notes they are negotiable and are payable only upon surrender of the instrument properly endorsed. There is not even an allegation either that the transfer to the First National Bank had been made after maturity of the certificates or that the endorsee took them with notice of the fraud.

As neither the certificates of deposit nor the holder thereof were within the State of Florida, its courts could not—in the absence of consent—acquire jurisdiction to determine the liability of maker to holder.

Affirmed.